Supreme Court, U.S.
FILED

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No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1998

CRAIG P. WALLIN,
Petitioner,

v.

MINNESOTA DEPARTMENT
OF CORRECTIONS, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

STEPHEN CHARLES FIEBIGER
Counsel of Record

STEPHEN C. FIEBIGER &
ASSOCIATES CHARTERED
1400 AT&T TOWER
901 MARQUETTE AVENUE
MINNEAPOLIS, MN 55402
(612) 359-0061

Attorney for Petitioner

BECKER GALLAGHER LEGAL PUBLISHING, INC., CINCINNATI, OHIO 800-890-5001

S9PP

QUESTIONS PRESENTED

1. Whether a waiver in a grievance settlement under a collective bargaining agreement between a union and state employer of an individual employee's constitutional and statutory claims is enforceable under *Alexander v. Gardner-Denver Co.*, and its progeny?

2. Is due process satisfied by pre-suspension investigatory interviews of a state employee under a collective bargaining agreement that limits the basis for suspension?

3. Does a summary judgment of claims brought under the Americans with Disabilities Act enjoy *de novo* review?

4. Can a state employee be deprived of liberty interests by stigmatizing statements made at the time of his termination when he is reinstated and the termination is changed to a suspension following an arbitrator's ruling over a year later?

PARTIES TO THE PROCEEDING

Petitioner

Craig P. Wallin

Respondents

Minnesota Department of Corrections; Dennis Benson, individually and in his official capacity as Chief Executive Officer (Warden) of the Minnesota Correctional Facility at Stillwater; David Corbo, individually and in his official capacity as Personnel Director and Associate Warden; Elizabeth A. Binkley, individually and in her official capacity as a Correctional Officer; Terry Bath, individually and in his official capacity as a Correctional Officer.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Craig P. Wallin respectfully prays this Court to issue a Writ of Certiorari to review the opinion of the Court of appeals for the United States Court of Appeals for the Eighth Circuit dated August 17, 1998.

OPINIONS BELOW

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 17, 1998 and the same is published at 153 F.3d 681 (8th Cir. 1998). App. B-3a. The order denying the Petition for Rehearing was issued on September 22, 1998. App. A-1a. The United States District Court for the District of Minnesota, the Honorable Paul A. Magnuson, issued its decision granting summary judgment on August 11, 1997. This decision is reported at 974 F. Supp. 1234 (D. Minn. 1997). App. D-29a. The district court awarded partial attorney's fees of $330.67, issued October 17, 1997, in connection with the release issue. App. C-22a.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit issued its opinion on August 17, 1998. The Petitioner filed a Petition for Rehearing on August 31, 1998 which was denied by the Eighth Circuit Court of Appeals on September 22, 1998. This Petition for Writ of Certiorari is filed within 90 days of the denial of the Petition for Rehearing. This Court's jurisdiction is invoked pursuant to 28 U.S.C. §§ 1254(1), 2106, and Supreme Court Rule 20.4.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. XIV § 1

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983 - Civil action for deprivation of rights:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State, or Territory of the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit and equity, or other proceeding for redress. For purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 12112, in relevant part:

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes --

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity.

STATEMENT OF THE CASE

This case presents important questions addressing waiver of a employee's constitutional and statutory claims by his union in a grievance settlement with a state employer, due process rights prior to suspension under a Collective

Bargaining Agreement (CBA), implication of liberty interests by stigmatization of a terminated employee who is later reinstated, and the standard of review of a summary judgment of claims brought under the Americans with Disabilities Act (ADA). The district court had federal question jurisdiction pursuant to 28 U.S.C. § 1331 and § 1343(3) and (4) in lieu of claims asserted under 42 U.S.C. §§ 1983 and 12111, *et seq.* The Petitioner requests the Supreme Court grant certiorari in order that the law governing these issues is determined for all public employees under a CBA asserting constitutional and statutory claims against state employers.

Craig P. Wallin, a twelve-year employee, was employed as a Correctional Officer at the Minnesota Correctional Facility at Stillwater (MCF-STW) in Stillwater, Minnesota. As a Corrections Officer, Mr. Wallin guarded convicted felons and in 1985 was promoted from Corrections Officer-II to a Corrections Officer-III (Sergeant position). He worked as a Sergeant at MCF-STW until 1991 without difficulty. In 1991, he was diagnosed with depression and, subsequently, alcoholism, and underwent in-patient treatment in 1992.

On August 25, 1992, Mr. Wallin was discharged from MCF-STW while serving a fifteen-day jail sentence for domestic assault. He received neither a *Loudermill* hearing nor just cause procedures under the CBA. He filed a grievance through his Union, the American Federation of State, County, and Municipal Employees (AFSCME), ("the Union"), pursuant to the CBA. The grievance proceedings resulted in a Settlement Agreement between the Union and MCF-STW that reinstated Mr. Wallin at the rank of CO-II, while remaining at the pay rate for CO-III. App. E-53a. The Settlement Agreement ("Settlement Agreement"), dated December 11, 1992, was negotiated exclusively by the Union.

Wallin did not discuss with the Union trying to settle everything with regard to his termination. (Helseth depo., p. 14; JA-612). The parties to the Agreement were the Union and the Minnesota Department of Corrections (Helseth depo., pp. 67-8; JA-625). The Union never represented Mr. Wallin on federal civil rights or state tort claims. (Helseth depo., pp. 60; JA-622). As the bargaining agent, the Union could settle Mr. Wallin's grievance without his authorization or approval. (Helseth depo., pp. 9-10). Mr. Wallin's attorney reviewed an early draft of the Settlement Agreement but never reviewed the final Settlement Agreement or signed off on its terms. (JA-25-6). Wallin's attorney sent the Union agent a letter of December 18, 1992 about the earlier draft of the Settlement Agreement, but this was one week after the Settlement Agreement was already signed. (JA-660-1). He never saw the final Agreement, much less signed off on it as the appeals court concluded. App. E-56a. The Union agent testified that the letter from Wallin's attorney had no impact on the settlement. (Helseth depo., p. 20; JA-613). Mr. Wallin, however, signed the bottom of the Settlement Agreement on December 31, 1992, beneath language stating, "I understand and voluntarily accept the terms of this settlement and release." *See* App. E-56a.

Upon Mr. Wallin's return to work at MCF-STW on January 12, 1993, he was subjected to harassment by other correctional officers. On his first day back, Sgt. Terry Bath ordered Officer Steven Summers to work with Wallin, but Summers told Bath he did not want to work with him [Wallin]. On January 31, 1993, Bath, in the presence of other officers and within earshot of inmates, sarcastically stated, "It's just like these alcoholic fuckers that -- around here that go to treatment, go serve a jail sentence, and the institution allows them to come back; this is a bunch of bullshit." The "alcoholic fuckers" incident deeply affected Mr. Wallin's

depression according to his therapist, Dr. Peter Nasseff. (JA-3611-2). Petitioner filed a formal complaint against Bath under the institution's complaint process, but Bath received no formal discipline from the institution.

The "alcoholic fuckers" incident in 1993 was not Bath's first harassment of Mr. Wallin on account of his disabilities. In July of 1991, after Mr. Wallin's first leave of absence for his depression, Bath confronted him and stated, "I think I'm going to get a hold of a psychologist so I can get a week off work. I understand that's how you got time off." Bath sarcastically asked if he was still "stressed out" when he returned. At the same time, Mr. Wallin found a calendar by his desk with pictures of psychiatrist beds drawn on the days Mr. Wallin was on leave. This was reported by Mr. Wallin to the lieutenant on duty without response.

In May of 1992, Incident Reports were prepared by Officers Fuentes and Bates when Bath threatened to write an Incident Report on them because Mr. Wallin, who was their sergeant, had written up an officer in Bath's unit. (Bath depo., p. 26). Despite the Incident Reports, Bath was not disciplined. Later, Bath obtained access to the facility's PA system in the yard and broadcast, "Wallin, get your dopey butt down here, you dummy." (Hillengass depo., p. 57).

On April 3, 1993, Bath denied Mr. Wallin an "early out" from his assignment. An early out would have allowed Mr. Wallin to leave his shift early because of sufficient staffing. Mr. Wallin's formal complaint to the institution about Bath, who was the supervising sergeant, was again denied when Bath was not disciplined.

On April 20, 1993, Mr. Wallin was involved in an incident with another corrections officer, Hughes, allegedly

occurring during a count situation. Hughes confronted Mr. Wallin in front of inmates, telling him, "Come on, let's get going here, we're going to be holding up count." (JA-2358). Hughes said, "If you don't want to do it, I'll do it myself, it's, you know it's no big deal." (JA-2358). She told Mr. Wallin to "hurry up" in front of inmates (Hughes depo., p. 52). Hughes and Wallin completed the count of the galleys on the night in question. Mr. Wallin did not physically touch her and, according to Hughes, took the key, unlocked the door, and did his job. Hughes accused Wallin of intimidating and harassing her in front of inmates in a later complaint. On the night in question, she sarcastically taunted Mr. Wallin at the sergeant's desk saying, "I'm whining to Dodge", the sergeant on duty. (Hughes depo., pp. 108-9). Hughes left the prison that evening without reporting the incident to the sergeant or the watch commander. She failed to write an Incident Report as per prison procedure and went home for the evening. The arbitrator of Mr. Wallin's grievance concluded that Hughes was not harassed and that the incident did not warrant discipline of Mr. Wallin.

The prison, however, placed Mr. Wallin on investigatory suspension without pay on April 22, 1993, per Warden Dennis Benson. Mr. Wallin was interviewed by investigator Dave Wilmes about the Hughes situation on April 21, 1993. Just before that interview, Mr. Wallin was interviewed by a separate investigator, Crawford, about an inmate shakedown occurring over a month earlier. Mr. Wallin was not counseled by any of his supervisors about the inmate situation or the Hughes situation. Mr. Wallin received no written notification setting forth the basis for his suspension.

On April 30, 1993, Mr. Wallin was discharged from employment and presented with a discharge letter by Benson

at a *Loudermill* hearing at the prison. The letter was prepared in concert with Personnel Director Dave Corbo. Benson's letter articulated a litany of alleged wrongdoings and misconduct by Mr. Wallin, culminating in the Hughes incident, that purported to support his discharge. Mr. Wallin, however, was not afforded supervisory conferences by his supervisors after each incident, customary practice, in order to address and correct any alleged performance or conduct deficiencies, nor did Mr. Wallin receive just cause progressive discipline under the CBA. Because of the failure to accord Mr. Wallin just cause under the CBA, an independent arbitrator reinstated him following an arbitration.

One of the incidents in Benson's discharge letter involved Mr. Wallin testing a co-officer's security skills. Mr. Wallin intentionally left one galley, among five, on "key lock", instead of deadlock, with the knowledge of his sergeant, Richard Dodge. Wallin never left an entire cell block "unbolted". The possibilities of an escape were non-existent, the sergeant knew about the status, but let it play out. (Dodge depo., pp. 53-55). Key lock means the cells are locked and then the brake is thrown to deadlock. The sergeant, who knowingly allowed the incident to play out, never wrote an Incident Report over the matter, contrary to policy. The arbitrator agreed that the brake lock incident did not warrant Mr. Wallin's discharge.

Mr. Wallin complained that the *Loudermill* hearing was a sham and the result pre-determined. At the *Loudermill* hearing, he told Warden Benson about his depression and that it was preventing him from performing somewhat at the time. He also told Warden Benson about problems with medications and memory. Mr. Wallin's psychiatrist, Dr. Steven Genheimer, noted Wallin's complaints of memory loss at the time. (JA-3640-1). Mr. Wallin's efforts to transfer from the

facility were all denied.

Upon returning in 1994, Mr. Wallin was subjected to the incidents of harassment stated above, as well as other incidents in 1994 involving a sarcastic card placed in a staff area, failure of the supervisor to investigate, a lieutenant's comments that she would "ride" him within earshot of inmates, and being subjected to interrogation for off-duty comments in a bar -- all were rejected. Likewise, a complaint by Mr. Wallin for off-duty comments by Officer Summers was also rejected. (JA-2825-6).

Later, after Mr. Wallin's second reinstatement in 1994, Bath pushed a laundry cart into him saying, "Get your fat ass out of the way." In April of 1995, Bath solicited another officer to "squish" Mr. Wallin in the entrance gate for twenty dollars. Mr. Wallin's formal complaints about Bath's harassing conduct were reported by Mr. Wallin. In the investigation of Mr. Wallin's complaint against Bath for offering another officer twenty dollars to squish the Petitioner in the entry gate, the investigator noted that none of Wallin's complaints about Bath had been upheld (JA-4041).

Mr. Wallin submitted evidence to the district court of other corrections officers who had engaged in more serious misconduct and received less discipline than himself. This included an officer who received a five-day suspension for physically assaulting another officer, lied to Internal Affairs investigators, and changed his story when re-interviewed. (JA-2831-35, 36-7, 3097). Another officer received a two-day suspension for a number of offensive incidents involving a female officer at work with whom he had had a relationship. (JA-2946). This conduct included a heated interchange over the intercom system for ten to fifteen minutes in a loud, unprofessional, and offensive manner, statements that if he

had a gun he'd like to shoot the chief steward, who made him sick, and telling another officer to "get the (expletive) out. (JA-2945). I want to talk to my bitch". The officer placed one of his hands on the neck and arm of the female officer in a hold and forcibly pushed her into a bathroom, closed the door, and she was not permitted to leave. (*Ibid.*). Other officers reported hearing the officer refer to the female officer as "bitch". These events occurred over several weeks and Warden Benson was aware that the officer placed the female officer into a custodial hold on more than one occasion.

A supervising lieutenant received only a written reprimand for confronting another staff member in the presence of another supervisor and stating, "If you ever do that to me again, I will either slap the shit out of you or make a citizen's arrest." (JA-2831.30-1; 3060). Yet another officer received a five-day suspension for sexually harassing remarks made to a female at an off-duty party, including, "You shouldn't bend over like that", "Take off your jacket and let me see what's under there", and "If two men were having sex, would that turn her on and if she would like it". The same officer made comments about the Commissioner of Corrections having oral sex. (JA-3066). Other examples of corrections officers receiving less serious discipline than Mr. Wallin included a written reprimand for an assault on another officer at the prison by an officer (JA-4095); a one-day suspension without pay for possession of a controlled substance in an officer's vehicle on institution grounds (JA-3588); a three-day suspension for an officer arising out of two counts of assault on his children (JA-4127); and a one-day suspension of an officer for sexual harassment perpetrated over an extended period of time on a co-worker (JA-2831.25 and 3051). These included comments such as, "Bring your big tits in here" in front of other staff and inmates. On another occasion, the officer told a female officer, "I was

hoping you'd put your big tit in my hand" and, on several occasions, commented to female supervisors about the size of their breasts. In a separate case, an officer was suspended for five days without pay for harassment and threats to another officer occurring over a three-month period at the prison. (JA-4125). The Court of Appeals concluded that the other employees were not similarly situated to Mr. Wallin because their misconduct was not as egregious as Wallin's. 153 F.3d at 687, App. 11-a.

Wallin commenced an action against the Minnesota Department of Corrections, Dennis Benson, Warden of MCF-STW, David Corbo, Personnel Director and Associate Warden, Elizabeth A. Binkley (Hughes), and Terry Bath, all individually and in their official capacities, for discrimination on account of disability in violation of the American with Disabilities Act (Corrections) and for violation of due process rights under the Fourteenth Amendment of the United States Constitution in violation of 42 U.S.C. § 1983. The district court granted summary judgment. On appeal to the United States Court of Appeals for the Eighth Circuit, Mr. Wallin asserted that genuine issues of material fact existed for the jury to determine with respect to his discrimination claims under the Americans with Disabilities Act (ADA), that the Settlement Agreement waiving his pre-settlement constitutional and statutory claims was not enforceable, supported by *amicus curiae* EEOC, and that he was denied due process and liberty interests in his suspension and discharge from employment. The Eighth Circuit affirmed the summary judgment and denied Mr. Wallin's Petition for Rehearing. These federal questions were raised in the district court, preserved on appeal, and are now before this Court on Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

I. Certiorari should be granted in order to determine whether a union's waiver of a public employee's rights to a federal judicial forum for constitutional and statutory claims in a settlement agreement of a grievance under a collective bargaining agreement with the employer is enforceable.

All discharged public employees subject to a collective bargaining agreement's grievance procedures will have their rights to a judicial forum for their constitutional and statutory claims subject to waiver by their union if such waivers are judicially enforceable against the employee. On certorari, this Court should resolve the question of whether a public employee's constitutional and statutory rights can be brought into the CBA grievance process between the union and employer and waive the employee's right to a judicial forum on those claims.

Under the jurisprudence established by this Court in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), which held that an employee did not forfeit his right to a judicial forum for claimed discrimination in violation of Title VII of the Civil Rights Act of 1964, Wallin's union was unable to waive his constitutional and statutory claims in the context of a settlement of a grievance under the CBA. Legislative enactments in this area have long evinced a general intent to a court parallel or overlapping remedies against discrimination. *Alexander v. Gardner-Denver Co.*, 415 U.S. at 47. The Supreme Court rejected the argument that the disposition of a contractual grievance could somehow bar a subsequent suit alleging a violation of federal statutory law. The Court acknowledged that, should the employee

prevail on his grievance, there could be no "duplicative recovery". *Ibid.*, at 51, n. 14. The Court ruled, however, that, by definition, the claims raised in a grievance filed under a CBA were contractual only, leaving the individual free to pursue additional statutory remedies even for discrimination stemming from the "same factual occurrence". *Ibid.*, at 50. The pursuit of a union grievance pursuant to the terms of a CBA, such as Wallin's, should not place his federal constitutional and statutory claims in peril, under *Alexander v. Gardner-Denver Co.* The union could not bargain away the individual member's constitutional rights. *Ibid.*, at 51-2.[1]

In *Alexander*, there was no voluntary settlement expressly conditioned on a waiver of the petitioner's cause of action under Title VII. In determining the effectiveness of any such waiver, a court would have to determine at the outset that the employee's consent to the settlement was voluntary and knowing. *Ibid.*, at 52, n. 13. In Wallin's case, the waiver was bargained for by the Union and employer in the December 11, 1992 Settlement Agreement. The acknowledgment at the bottom of the Settlement Agreement by Mr. Wallin was of no impact on the formation of the Settlement Agreement and woefully inadequate to constitute a voluntary and knowing waiver of his federal constitutional rights. This requirement is consistent with the recent case of *Wright v. Universal Maritime Service Corporation, et al.*, ___

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[1] The district court imposed attorney's fees of $330.67 against Petitioner for litigating the release issue and the Court of Appeals affirmed. Petitioner litigated this issue in good faith under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), and was supported on this issue on appeal by the United States Equal Employment Opportunity Commission (EEOC) as *amicus curiae*. He asks that the attorney's fees award be vacated or, alternatively, reviewed upon granting of a Writ of Certiorari.

U.S. ___, 119 S. Ct. 391 (1998), in which this court held that in order for a union to waive an employee's rights to a federal judicial forum for statutory anti-discrimination claims, the agreement to arbitrate must be particularly clear. 119 S. Ct. at 396.[2] The court will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' *Ibid.* More succinctly, the waiver must be clear and unmistakable. *Ibid.* The Settlement Agreement between Mr. Wallin's Union and employer contained no explicit language waiving claims under 42 U.S.C. § 1983. Constitutional and statutory claims should not be so easily thrown into the mix to resolve the grievance between the union and employer as was done here.

In *McDonald v. West Branch*, 466 U.S. 284 (1984), the holding of *Gardner-Denver* was followed to preclude the effect of a CBA arbitration upon an employee's claims under 42 U.S.C. § 1983. Because § 1983 creates a cause of action, there is, of course, no question that Congress intended it to be judicially enforceable. *Ibid.*, at 290. The very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights -- to protect the people from unconstitutional action under color of state law. *Ibid.*, at 290. This court reviewed a number of reasons why affording preclusive effect to the grievance process was inadvisable. The court noted, *inter alia*, that the union has exclusive control over the "manner and extent to which an individual grievance is presented". *Ibid.*, at 291. The union's interests and those of the individual employee are

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[2] In *Wright*, this court found it unnecessary to resolve the question of the validity of a union-negotiated waiver, the question presented here. 119 S. Ct. at 395.

not always identical or even compatible. *Ibid.*, at 291. The court noted that, in an arbitration award context, an employee's opportunity to be compensated for a constitutional deprivation might be lost merely because it was not in the union's interest to press his claim vigorously. *Ibid.*, at 291. According preclusive effect to arbitration awards in § 1983 actions would severely undermine the protection of federal rights that the statute is designed to provide. *Ibid.*, at 292.

This rationale applies to a union's waiver of an employee's § 1983 claims via a release in a union-negotiated Settlement Agreement. The failure to proceed to arbitration is of no consequence because the issue is the same. The union alone decides whether or not to proceed to arbitration or settle the grievance. In Wallin's case, the Union had no ability under the CBA to arbitrate employees' federal constitutional or statutory claims. It enjoyed no greater right to do so via a Settlement Agreement with the employer.

Gilmer v. Interstate/Johnson Lane Corporation, 500 U.S. 20 (1991), is distinguishable. *Gilmer* involved an experienced businessman who personally entered an arbitration agreement. *Gilmer* did not occur in the context of a Collective-Bargaining Agreement with the concomitant tension between collective representation and individual statutory rights not applicable to *Gilmer*. *Ibid.*, at 34-35.[3] By

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[3] The Court of Appeals' reliance upon Mr. Wallin's advice of counsel in signing the Settlement Agreement is misplaced. There was no evidence Wallin had the advice of counsel with respect to the final Settlement Agreement entered by the union. The union agent testified the letter from Wallin's attorney of December 18, 1992 about an earlier draft of the Agreement had no impact on the settlement a week before. The draft reviewed by Wallin's attorney, in fact, omitted the paragraph waiving Wallin's federal

contrast, the Union entered the Agreement to waive Mr. Wallin's constitutional and statutory claims. Wallin, discharged and without an income, was in a much different position.

Because the Union was unable to waive Mr. Wallin's federal constitutional and statutory claims in the collective bargaining grievance process, the release of his claims under 42 U.S.C. § 1983 in the December 11, 1992 Settlement Agreement is unenforceable and the Writ of Certiorari should be granted. Otherwise, public employers will unfairly insist on unions waiving employees' constitutional and statutory claims, not covered under the CBA, as a condition to settling union grievances. Precious constitutional and statutory rights of individuals to judicial relief should not be relinquished in this manner.

II. Certiorari should be granted in order to establish the parameters of due process prior to suspension of a public employee.

According to Wallin's CBA, an employee could only be suspended without pay if "a reasonable basis exists to warrant such suspension." (CBA at 48, JA-1190). When

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constitutional and statutory rights. While Wallin acknowledged acceptance of the Agreement, this is insufficient to demonstrate a voluntary and knowing waiver of explicit constitutional and statutory claims. The union, and not Wallin, was the signatory party. The district court, moreover, cited the 15-day rescission clause in the Agreement as a means whereby Wallin could have rescinded the entire Agreement. App. D-36a. This clause, however, gave Wallin no rights to rescind the entire Agreement and was a confused attempt to address his state Minnesota Human Rights Act claim. *See* App. E-55a.

protected interests are implicated,the right to some kind of prior hearing is paramount. *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972). Craig Wallin was suspended, without pay, from employment at the prison on April 22, 1993, prior to notice of the charges against him and an opportunity to respond. Instead, he was interviewed by two separate investigators on April 21, 1993, about an inmate shakedown incident in March and the Hughes incident of April 20, 1993. Neither of the interviewers, Wilmes and Crawford, notified Wallin of any charges that could lead to discipline, nor did they address all of the allegations and charges in Benson's subsequent discharge letter of April 30, 1993. Permitting suspension of employees based upon incomplete investigatory interviews deprives public employees of due process in contrast with the Eighth Circuit's prior decision in *Bartlett v. Fisher*, 972 F.2d 911 (8th Cir. 1992). Other circuit courts have held that the employee is entitled to notice and opportunity to meet with and respond to the ultimate decision-maker, or supervising authority prior to suspension from employment. *See Boals v. Gray*, 775 F.2d 686 (6th Cir. 1995) (supervising authority); *Garraghty v. Jordan*, 830 F.2d 1295 (4th Cir. 1987) (supervising authority); *Goss v. Lopez*, 419 U.S. 565 (1975) (school principal). Wallin never met with the ultimate decision-maker, Warden Benson, regarding the charges against him before he was suspended. This Court should resolve what process is due prior to suspension from employment.

The Eighth Circuit's suggestion that Wallin's private interest in uninterrupted employment was minimal because the unpaid suspension was limited to five days, he retained his benefits, and a *Loudermill* hearing was provided shortly after his suspension, failed to consider the arbitrariness of the suspension by Benson. The absence of any oral or written notification of changes underscores the inadequacy of notice

prior to the suspension, coupled with an inadequate opportunity to respond. The investigatory interviews addressed only two incidents. Wallin's subsequent *Loudermill* hearing of April 30, 1993, addressed many, many more incidents, for which Wallin received no notice or opportunity to respond prior to his suspension.

Here, Warden Benson gave Wallin a suspension memo of April 22, 1993, advising him of his five-day suspension without pay pending investigation. (JA-2880). This was to give the investigators time to complete the investigation and make a decision about Wallin's future with the department, according to Benson. (JA-2810-11). The report by Wilmes, containing Wallin's interview statement, and others, was given to Benson on April 27, five days after the suspension. (JA-2809, 2851). Benson lacked reasonable information sufficient to justify the suspension.

Permitting public employees to be suspended simply based upon selected interviews by non-decision-makers deprives employees of a *Loudermill* hearing prior to the suspension of a public employee who has a property interest in retaining the job. *Bartlett v. Fisher*, 972 F.2d 911, 915 (8th Cir. 1992) (employee entitled to oral or written notice of charges, explanation of evidence against him, and opportunity to present side of story). Condoning the means to justify the end does not suffice to deprive public employees of due process prior to suspension from employment.

"[D]ue process is flexible and calls for such procedural protections as the particular situation demands." *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). One central principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to

the nature of the case." *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 542 (1985); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950). The root requirement of the Due Process Clause is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. *Ibid.*, at 542. Applying this principle to a suspension requires some kind of a hearing prior to the suspension of an employee who has a constitutionally protected property interest in his employment. Investigatory interviews to solicit information of possible wrongdoing for a fact-finding purpose, for later use in disciplinary action, is inadequate due process.[4]

Adopting the Court of Appeals' construct of pre-suspension due process would permit the investigatory interview to simultaneously provide notice of a substantive charge of wrongdoing. This perilous approach grants the employer a blank check for suspending employees merely upon suspicion, so long as they are interviewed. This practice falls far short of safe-guarding individual rights prior to suspension from employment. Because Wallin was deprived of due process prior to his suspension from employment without pay, certiorari should be granted to delineate the due process rights before suspension of public employees.

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[4] The court's decision in *Gilbert v. Homar*, ___ U.S. ___, 117 S. Ct. 1807 (1997) is distinguishable, because the employee did not face termination but only a temporary suspension without pay. 117 S. Ct. at 1813 (emphasis in original). The filing of felony charges against the employee provided additional procedural protections not present in Wallin's case.

III. Because the Federal Court of Appeals applied the wrong standard on review of a summary judgment of disability discrimination claims of a public employee under the Americans with Disabilities Act, this Court should grant certiorari.

Summary judgment should not be granted unless it is clear that a trial is not necessary as enunciated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Any doubt as to the existence of a genuine issue for trial should be resolved against the moving party. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-159 (1970). The Court of Appeals failed to apply this standard to Mr. Wallin's claims of disability discrimination in violation of the Americans with Disabilities Act (ADA), 42 U.S.C. § 12112 and certiorari should be granted so the proper standard is followed by federal courts for all ADA claims.

Contrary to the Court of Appeals' conclusion, Bath harassed Wallin after the "alcoholic fuckers" incident again in the "early out" incident of April 3, 1993, the laundry cart incident in 1994, and the solicitation of another officer to squish Wallin in the entrance gate for twenty dollars. The investigator of the last incident noted Bath's failure to be reprimanded for prior incidents. This, combined with the other incidents, supported liability. *Cf. Faragher v. City of Boca Raton*, ___ U.S. ___, 118 S. Ct. 2275 (1998).

The Court of Appeals' conclusion that Wallin's misconduct was not as egregious as the other employees involved weighing facts that rest within the domain of the jury. For example, the evidence of physical assault by an officer, who lied in the investigation and later changed his story, could be viewed as more egregious than Wallin's

conduct. The officer who sexually and physically harassed a female officer, placing her in headlocks, and forcing her into a bathroom, is more egregious. Threats of physical assault by a supervising lieutenant upon other staff is more egregious than Wallin's conduct. Likewise, the incidents of sexual harassment and offensive comments by officers, cited by Wallin, is, arguably, more egregious. The same is true with respect to the officer found on prison property with illegal drugs, who received a mere one-day suspension. On summary judgment, these matters are to be resolved in the non-movant's favor.

The *prima facie* case in discrimination cases varies somewhat with the specific facts of each case. *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248, 253-4, n. 6 (1981), *citing McDonnell-Douglas Corp. v. Green*, 411 U.S. 792 (1973). The *prima facie* case raises an inference of discrimination only because we presume these acts, if otherwise explained, are more likely than not based on the consideration of impermissible factors. *Furnco Construction Corp. v. Waters*, 438 U.S. 567, 577 (1978). The standard for a plaintiff to survive summary judgment requires only that he adduce enough admissible evidence to raise genuine doubt as to the legitimacy of the defendant's motive, even if the evidence does not directly contradict or disprove the defendant's articulated reasons for its actions. *Davenport v. Riverview Gardens School District*, 30 F.3d 940, 945, n. 8 (8th Cir. 1994) (noting plaintiff not required to present evidence of someone who committed the same four infractions without being discharged). Because discrimination can rarely be proven by eye witness testimony, circumstantial evidence is frequently necessary to prove discrimination. *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 804-05 (1973) (listing various types of circumstantial evidence as relevant to showing of pretext) (other citations omitted).

Wallin should not be required, nor may he be able to, produce evidence of other employees who were accused of the same conduct as his own who were disciplined. Instead, the evidence of other corrections officers receiving less discipline for acknowledged misconduct under the same CBA, policies and procedures, and employer is sufficient to create an inference of discrimination on account of disability at the *prima facie* case stage. Because the Court of Appeals failed to follow traditional summary judgment rules in its analysis of these ADA claims, this Court should grant the Petition for a Writ of Certiorari.

IV. Certiorari should be granted to address whether the rights of a state employee to pursue a claim for deprivation of liberty interests by stigmatizing statements made upon discharge survive when the employee is reinstated over a year later.

This case presents the question of whether a claim for deprivation of a public employee's liberty interest pursuant to 42 U.S.C. § 1983 upon his discharge from employment survives upon his reinstatement to employment following an arbitrator's ruling over a year later.[5] The Court of Appeals concluded that it did not. App. B-18a. Mr. Wallin had a liberty interest in pursuing his occupation and against stigmatizing statements. *Board of Regents v. Roth*, 408 U.S. 564 (1972); *Codd v. Velger*, 429 U.S. 624 (1977). Mr. Wallin's original discharge of April 30, 1998, created a stigma that Wallin was a dangerous individual among prison personnel without justification. Benson's discharge letter to

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[5] Wallin's reinstatement was without back pay which he sought to recover as a damage component of his § 1983 claim.

Wallin accused Wallin of continued harassment towards Hughes, without supporting evidence. Benson noted, "Your behavior and actions are unacceptable, and are a threat to the safety and security of this facility; have created a hostile work environment between yourself, fellow staff, and inmates; has jeopardized your safety and that of our staff members who work in the same unit with you." (JA-218, 2844). Benson stated to Wallin, "You have also demonstrated your potential for violence or potential to bring about violence as demonstrated by your past behavior outside the workplace as well as the incident involving the inmate and Officer Hughes; and you have violated various work rules." (JA-2819). Benson accused Mr. Wallin of a "harassing, indifferent attitude". (JA-2815, 2883). At Wallin's third step grievance hearing, Benson referred to Mr. Wallin as "bizarre", "possessing an explosive temper", and "a serious security threat", among other things. (JA-2824-5).

Benson's April 30, 1993 discharge letter was changed after Wallin prevailed at the arbitration. Benson and Corbo essentially took the letter and changed the date from April 30, 1993 to May 24, 1994. (JA-2823, 2894). The discharge letter was then called a "suspension" letter. (JA-3842). Despite the arbitrator's decision, the incidents discussed in Benson's first letter were kept in the second letter. (JA-3843).

Because Mr. Wallin was discharged from employment from April 30, 1993 until his reinstatement pursuant to the arbitrator's decision in 1994, he suffered a deprivation of his liberty interest by virtue of the stigmatizing statements about him in violation of 42 U.S.C. § 1983. *Board of Regents v. Roth*, 408 U.S. 564 (1972). Changing the characterization of the deprivation of his property interest, his employment, from a discharge to a suspension, belies the fact that he was

deprived of his employment for over a year. Because Mr. Wallin can pursue claims for violation of his federal civil rights independent of his grievance procedures under *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974), he is able to pursue his liberty interest claim for the one year of lost employment despite the arbitrator's ruling. Certiorari should be granted to address this important issue of the establishment of a liability interest deprivation despite reinstatement over a year later by an arbitration decision.

CONCLUSION

For all of the above reasons, Petitioner Craig P. Wallin respectfully requests that the Supreme Court grant his Petition for Writ of Certiorari.

RESPECTFULLY SUBMITTED,

/s/_____
Stephen Charles Fiebiger - 149664
Counsel of Record
STEPHEN C. FIEBIGER &
ASSOCIATES, CHARTERED
1400 AT&T Tower
901 Marquette Avenue
Minneapolis, MN 55402
(612) 359-0061

Attorney for Petitioner,
Craig P. Wallin

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO.97-3309/3956MNST

Craig P. Wallin, Appellant,	)
	) Appeals from the United
v.	) States District Court for the
	) District of Minnesota
Minnesota Department of Corrections, et al., Appellees.	)

[Filed September 22, 1998]

The petition for rehearing filed by the appellant has been considered by the court and is denied.

Order Entered at the Direction of the Court:

/s/_____
Clerk,
U.S. Court of Appeals Eighth Circuit

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 97-3309

Craig P. Wallin, Appellant, v. Minnesota Department of Corrections; Dennis Benson, individually and in his official capacity as Chief Executive Officer (Warden) of the Minnesota Correctional Facility at Stillwater; David Corbo, individually and in his official capacity as Personnel Director and Associate Warden; Elizabeth A. Binkley, individually and in her official capacity as a Correctional Officer; John & Jane Does, individually and in their official capacities as Correctional Officers at the Minnesota Correctional Facility at Stillwater; Terry Bath, individually and in his official capacity as a Correctional Officer, Appellees.	) Appeals) from the) United States) District Court) for the) District of) Minnesota

No. 97-3956

Craig P. Wallin,
Appellant,

v.

Minnesota Department of Corrections; Dennis Benson, individually and in his official capacity as Chief Executive Officer (Warden) of the Minnesota Correctional Facility at Stillwater; David Corbo, individually and in his official capacity as Personnel Director and Associate Warden; Elizabeth A. Binkley, individually and in her official capacity as a Correctional Officer; John Doe, individually and in their official capacities as Correctional Officer at the Minnesota Correctional Facility at Stillwater; Jane Doe, individually and in their official capacity as Correctional Officer at the Minnesota Correctional Facility at Stillwater; Terry Bath, individually and in his official capacity as a Correctional Officer,
Appellees.

Submitted: June 12, 1998 Filed: August 17, 1998

Before BEAM, ROSS, and MAGILL, Circuit Judges.

MAGILL, Circuit Judge.

Craig Wallin was twice discharged from his position as a corrections officer at the Minnesota Correctional Facility at Stillwater (MCF-Stillwater) and twice reinstated after grievance proceedings. After his second discharge and subsequent reinstatement, Wallin sued the Minnesota Department of Corrections, warden David Benson, human resources director David Corbo, and coworkers Terry Bath and Elizabeth Hughes, claiming they discriminated against him on the basis of his disabilities of alcoholism and depression in violation of the Americans with Disabilities Act of 1990, 42 U.S.C. § § 12101-12213, and failed to provide him due process or equal protection of the laws in connection with his terminations. The district court granted summary judgment in favor of the defendants, and Wallin appeals. We affirm.

I.

Wallin began working as a corrections officer at MCF-Stillwater in 1980. Eleven years later, in 1991, Wallin was diagnosed with depression and, in July 1991, MCF-Stillwater gave Wallin two weeks of leave on account of his depression. According to Wallin, after he returned, coworker Bath said: "'I think I'm going to get a hold of a psych so I can get a week off work. I understand that's how you got time off.'" Wallin Dep. (Mar. 6, 1996) at 80-81, reprinted in J.A. at 87-88. Wallin also noticed that someone had drawn pictures on his calendar on each of the days he was absent from work that appeared to be psychiatrist beds. Wallin reported the bed incident, but not Bath's comment, to his supervisor. It was around this time that Wallin began abusing alcohol.

In March 1992, Wallin was arrested and charged with assaulting his girlfriend. Pending trial, MCF-Stillwater permitted Wallin to return to work if he completed a chemical

dependency program and remained chemical-free for three years. In August 1992, Wallin pled guilty to one count of gross misdemeanor assault in connection with the assault and received a fifteen-day workhouse sentence. On August 25, 1992, MCF-Stillwater discharged Wallin because of the conviction.

Wallin's union, the American Federation of State, County, and Municipal Employees (AFSCME), represented Wallin in grievance proceedings under the collective bargaining agreement (CBA) covering Wallin's employment. The grievance proceedings resulted in a settlement between AFSCME and MCF-Stillwater that reinstated Wallin with a demotion of one rank, but without reducing his pay (Settlement Agreement). The Settlement Agreement, dated December 11, 1992, settled all claims between the parties.[1]

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[1] The relevant section of the Settlement Agreement reads as follows:

The parties agree that this Settlement and Release is made for the purpose of releasing and discharging each other (including their employees, agents, officers and officials jointly and severally, individually and in their official capacities) by compromising and finally settling all claims, differences, grievances and causes of action against the above-noted parties based on any and all acts or omissions allegedly committed by them, including but not limited to, claims based upon contract, employment agreement, violation of statutory law, violation of civil or constitutional right, or tortuous conduct arising from or in any way connected with the parties' employment relationships, up to and including the date of this Settlement and Release.

Settlement Agreement (Dec. 11, 1992) at 1, reprinted in J.A. at 25 (emphasis added).

AFSCME and MCF-Stillwater signed the agreement, and Wallin acknowledged that he "understood and voluntarily accept[ed] the terms of this Settlement." Settlement Agreement (Dec. 11, 1992) at 2, reprinted in J.A. at 26.

After Wallin returned to work in January 1993, he claims he was subjected to discrimination when, on January 31, 1993, he overheard coworker Bath say the following to another employee: "It's just like these alcoholic fuckers that--around here that go to treatment, go serve a jail sentence, and the institution allows them to come back; this is a bunch of bullshit." Bath Dep. (Feb. 7, 1997) at 40, reprinted in J.A. at 3172. Bath later apologized for this comment, and received a verbal reprimand after MCF-Stillwater investigated the incident. In the spring of 1993, Wallin requested to be transferred to certain other prison facilities, but never suggested that a transfer was necessary to accommodate his disabilities. In fact, there is no evidence that Wallin gave any reason for requesting the transfers. His requests were denied by the transferee prisons.

In late March, Wallin began a dangerous pattern of misconduct and misbehavior. On March 28, 1993, Wallin administered an overly aggressive and unusually lengthy shakedown of an inmate even though a fellow officer could not discern the inmate doing anything wrong. Wallin smiled and told the fellow officer that that was how a shakedown was done. On April 3, 1993, Wallin intentionally left the cell doors in an entire cell block unbolted, creating a security breach. In a memo admitting to the incident, Wallin would not admit that what he had done was wrong, instead explaining that he sought to test a fellow officer who was assigned to check Wallin's work. Wallin would not assure MCF-Stillwater that such unauthorized conduct would not be repeated, instead saying that "it more than likely won't

happen again." Wallin Mem. (Apr. 4, 1993), reprinted in J.A. at 2394. On April 20, 1993, Wallin threatened coworker Hughes in front of inmates, while the two were alone doing a nighttime check of the cells. Wallin became very agitated, held the keys needed to get through a gate, backed Hughes up against a railing, cornering her, and refused to give her the key she needed to get through the gate. According to Hughes, Wallin told her: "'Don't you be telling me what to do . . . You really think you're something around here but you ain't shit ' " Hughes Interview (Apr. 21, 1993) at 4, reprinted in J.A. at 2358. Wallin finally opened the door, saying that he did not care if she reported him.

Thereafter, Wallin was interviewed regarding the security breach, the shakedown, and the Hughes incident. Wallin would not admit to much of what others claimed he had done, and often claimed that he could not remember important details. Wallin was suspended without pay pending further investigation.[2] On April 30, 1993, at a meeting between Wallin, Benson, Corbo, Wallin's attorney, and Wallin's union representative, Wallin was terminated. At the meeting, Wallin explained that he was having problems with his medication. Wallin received a termination letter at the meeting that explained that Wallin's termination was due to the three above-described incidents, along with numerous other minor incidents of misconduct.

AFSCME again represented Wallin in a grievance challenging his termination. The grievance was submitted to

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[2] The CBA specifically permitted "an investigatory suspension without pay provided a reasonable basis exists to warrant such suspension." CBA at 48, reprinted in J.A. at 1190. The CBA limited such an unpaid suspension to five days.

arbitration. An arbitrator concluded that the security breach and shakedown warranted discipline, but that the incident between Wallin and Hughes was not harassment and did not constitute punishable wrongdoing. According to the arbitrator, the two incidents of misconduct were not extreme and did not constitute just cause for terminating Wallin. Therefore, the arbitrator ordered that Wallin be reinstated, and that the period between Wallin's termination and his reinstatement be treated as an unpaid disciplinary, suspension. The discharge letter remained in his file, but was renamed a "suspension" letter.

On November 11, 1993, while the arbitration was pending, Wallin filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), charging that he was the subject of disability discrimination between January 14, 1993 and April 30, 1993. On August 3, 1995, the EEOC issued a right to sue letter.

Wallin then filed the instant suit, claiming that MCF-Stillwater violated the ADA under a variety of theories. Wallin also claimed, trader 28 U.S.C. § 1983, that Benson, Corbo, Hughes, and Bath denied him due process and equal protection of the laws. The district court granted summary judgment in favor of the defendants on all of Wallin's claims. The district court also awarded partial attorneys' fees of $330.67 to the defendants. Wallin appeals the district court's grant of summary judgment.[3]

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[3] Wallin also appeals the award of attorneys' fees. Because the district court did not abuse its discretion, we affirm. See Warner v. Independent Scht Dist. No. 625, 134 F.3d 1333, 1336 (8th Cir. 1998) (standard of review).

II.

We review the district court's grant of summary judgment de novo. Miners v. Cargill Communications, Inc., 113 F.3d 820, 822 (8th Cir.), cert. denied, 118 S. Ct. 441 (1997). Summary judgment is appropriate if "there is no genuine issue as to any material fact and.., the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). In determining whether the moving party is entitled to summary judgment, we "resolve all controversies in favor of the non-moving party, take the non-movant's evidence as tree, and draw all justifiable inferences in favor of that party." Miners, 113 F.3d at 823. However, "the non-movant may not rest on allegations or derfials in its pleadings but must 'set forth specific facts showing that there is a genuine issue for trial.'" Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)).

Wallin first claims that MCF-Stillwater violated the ADA by terminating him in 1993 because of his alcoholism and depression.

> To establish a prima facie case under the ADA, a plaintiff must show [1] that she was a disabled person within the meaning of the ADA, [2] that she was qualified to perform the essential functions of the job, and [3] that she suffered an adverse employment action under circumstances giving rise to an inference of unlawful discrimination.

Miners, 113 F.3d at 823.

Proceeding directly to the third element of Wallin's

prima facie case under the ADA,[4] Wallin is required to come forward with evidence that his firing occurred in circumstances that could give rise to an inference of discrimination. That happens when "one can infer..., that it is more likely than not that such actions were 'based on a discriminatory criterion illegal under [federal law].'" Furnco Constr. Corp. v. Waters, 438 U.S. 567, 576 (1978) (Title VII) (quoting Teamsters v. United States, 431 U.S. 324, 358 (1977)). One common way to raise an inference is to prove disparate treatment "by showing that [plaintiff] was treated less favorably than similarly situated employees who are not in plaintiff's protected class." Johnson v. Legal Servs. of

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[4] As to the first element of the prima facie case, we doubt that Wallin has come forward with evidence that his alcoholism impaired a major life activity, see 42 U.S.C. § 12102(2)(A), because he was chemical free for one year prior to the period of alleged discrimination (and for two years after), and has presented no evidence showing that his major life activities were impaired. See Burch v. Coca Cola Co., 119 F.3d 305, 315-16 (8th Cir. 1997) (there must be an individualized showing that alcoholic plaintiff suffered permanent impairment, and evidence that alcoholics, in general, are impaired is inadequate), cert. denied, 118 S. Ct. 871 (1998). We also find the evidence of Wallin's depression to be sparse. Nonetheless, we need not definitively resolve those issues, and we need not determine whether MCF-Stillwater regarded Wallin as having those disabilities, see 42 U.S.C. § 12102(2)(C); Miners v. Cargill Communications, Inc., 113 F.3d 820, 823 (8th Cir.) (plaintiff is regarded as an alcoholic when she is "offered . . . the choice between entering a chemical-abuse treatment program or being fired"), cert. denied, 118 S. Ct. 441 (1997), if Wallin failed to establish the third element of his prima facie case. See Weber v. American Express Co., 994 F.2d 513, 515-16 (8th Cir. 1993) (plaintiff must establish factual dispute as to each element of prima facie case). As to the second element of the prima facie case, MCF-Stillwater admits that Wallin was qualified.

Ark., Inc., 813 F.2d 893, 896 (8th Cir. 1987) (racial and disability discrimination). Employees are similarly situated when they "are involved in or accused of the same or similar conduct and are disciplined in different ways." Williams v. Ford Motor Co., 14 F.3d 1305, 1309 (8th Cir. 1994).

Wallin argues that similarly situated employees were disciplined differently. Having examined the undisputed record, we disagree. The other employees cited by Wallin were not similarly situated to Wallin because their misconduct was not as egregious as Wallin's. Wallin, unlike the other employees, created a substantial public danger by leaving an entire cell block unbolted, and was involved in three serious, unrelated incidents in a short, one-month period while demonstrating a pattern of violent behavior. Additionally, Wallin, unlike the other employees, was evasive during investigation of the misconduct, would not admit to wrongdoing, and could not assure supervisors that he would not repeat his misdeeds.

No other evidence raises an inference of discrimination. The only event with any discriminatory implications was coworker Bath's statement that Wallin was an "alcoholic fucker." However, MCF-Stillwater showed that it would not tolerate such conduct when it promptly investigated the incident and reprimanded Bath. Thus, rather than allowing one to infer discrimination, MCF-Stillwater's prompt response gives rise to the opposite inference.

Nor will we infer discrimination simply because the arbitrator reinstated Wallin; instead, the reinstatement suggests only that, in the arbitrator's eye, MCF-Stillwater overreacted to Wallin's misconduct. See Johnson, 813 F.2d at 896 (personnel "[d]isputes generally arise out of mutual misunderstanding, misinterpretation and overreaction, and

without more, such disputes do not give rise to an inference of discrimination"). Thus, Wallin has come up with no evidence that can give rise to even a thin inference of discrimination in his firing, and this prima facie case must fail.[5]

B.

Wallin next argues that when he returned to work in 1993, his work environment was hostile. This Court has never recognized an ADA claim based on a hostile work environment, though other courts have done so. See, e.g. Keever v. City of Middletown, 1998 WL 271190, at *5 (6th Cir. May 29, 1998). We will assume, without deciding, that such a cause of action exists, and that "it would be modeled after the similar, claim under Title VII." McConathy v. Dr. Pepper/Seven Up Corp., 131 F.3d 558, 563 (5th Cir. 1997) (per curiam). To be actionable under Title VII, harassment must be "so 'severe or pervasive' as to 'alter the conditions of [the victim's] employment and create an abusive working environment.'" Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2283 (1998) (quoting Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)) (alteration in original). Because the discrimination laws are not a "general civility code," "offhand comments[] and isolated incidents (unless

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[5] Wallin also claims his discharge violated the Equal Protection Clause of the Fourteenth Amendment. Because Wallin has not come forward with any evidence that would permit the inference that he was treated differently because of his disability, his equal protection claim must also fail. See Klinger v. Department of Corrections, 31 F.3d 727, 731 (8th Cir. 1994) ("[T]he first step in an equal protection case is determining whether the plaintiff has demonstrated that she was treated differently than others who were similarly situated to her.").

extremely serious) will not amount to discriminatory changes in the terms and conditions of employment." Id. at 2283-84 (quotations omitted). Accordingly, "the ordinary tribulations of the workplace, such as the sporadic use of abusive language . . . and occasional teasing" are not actionable. Id. at 2284 (quotations omitted).

Wallin points to numerous incidents of friction between himself and his coworkers, but provides no evidence that this workplace friction was due to his disabilities. See Smith v. St. Louis Univ., 109 F.3d 1261, 1264 (8th Cir. 1997) (to prevail on hostile work environment claim under Title VII, plaintiff must prove "that the harassment was based on sex"). The only three incidents that related to Wallin's disabilities--Bath's suggestion that seeing a psychologist was a good method to obtain vacation the, the drawings on Wallin's calender,[6] and Bath's reference to Wallin as an "alcoholic fucker" in January 1993--are isolated incidents that are not sufficiently severe or pervasive to affect the terms or conditions of Wallin's employment. See Harris v. Forklift Sys., Inc., 510 U.S. 17, 23-(1993) (look to "frequency of the discriminatory conduct," among other things, to determine if work environment is hostile). Thus, Wallin's hostile work environment claim must fail.[7]

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[6] These first two incidents occurred in July 1991, a year and a half before the period during which Wallin claims his work environment became hostile, and prior to the effective date of the ADA. See Americans with Disabilities Act of 1990, Pub. L. No. 101-336, § 108, 104 Stat. 327, 337 (effective two years after its July 26, 1990 date of enactment).

[7] Moreover, Wallin felt comfortable reporting the "alcoholic fuckers" incident under MCF-Stillwater's harassment reporting procedures, and MCF-Stillwater quickly and thoroughly

C.

Wallin next argues that his 1993 discharge was in retaliation for making internal discrimination complaints. However, Wallin failed to allege retaliation in his EEOC Charge of Discrimination. "Allowing a complaint to encompass allegations outside the ambit of the predicate EEOC charge would circumscribe the EEOC's investigatory and conciliatory role, as well as deprive the charged party of notice of the charge, as surely as would an initial failure to file a timely EEOC charge." Williams v. Little Rock Mun. Water Works, 21 F.3d 218, 223 (8th Cir. 1994) (quotations omitted). Although "[a] plaintiff will be deemed to have exhausted administrative remedies as to allegations contained in a judicial complaint that are like or reasonably related to the substance of charges timely brought before the EEOC," id. at 222, it is well established that retaliation claims are not reasonably related to underlying discrimination claims. See, e.g., id. at 223 (plaintiffs "claims of race discrimination are separate and distinct from her claims of retaliation"). Thus, Wallin's retaliation claim will not be considered unless it "grew out of the discrimination charge he filed with the EEOC." Wentz v. Maryland Cas. Co., 869 F.2d 1153, 1154 (Sth Cir. 1989) (district court may hear retaliation claim when plaintiff is retaliated against for filing the EEOC charge that alleged only discrimination).

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investigated the incident, ultimately reprimanding Bath. Neither Bath nor Wallin's other coworkers have engaged in any such conduct since that reprimand. Cf. Faragher v. City of Boca Raton, 118 S. Ct. 2275, 2292 (1998) (employer can avoid liability for supervisor's harassment by "provid[ing] a proven, effective mechanism for reporting and resolving complaints of sexual harassment, available to the employee without undue risk or expense").

The retaliation Wallin alleges was not the result of his filing of the EEOC charge. Indeed, the retaliation alleged by Wallin occurred at the same time as the alleged discrimination, long before he filed a charge of discrimination with the EEOC. Because Wallin did not allege retaliation in his EEOC charge, we need not consider this claim.

D.

Next, Wallin argues that MCF-Stillwater violated the ADA when it failed to reasonably accommodate his disabilities by transferring him to a different prison facility where he would not be harassed. We disagree.

In general, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." 29 C.F.R. app. § 1630.9 (1992).

> Where the disability, resulting limitations, and necessary reasonable accommodations, are not open, obvious, and apparent to the employer, as is often the case when mental disabilities are involved, the initial burden rests primarily upon the employee . . . to specifically identify the disability and resulting limitations, and to suggest the reasonable accommodations.

Taylor v. Principal Fin. Group, Inc., 93 F.3d 155, 165 (5th Cir.) (emphasis added), cert. denied, 117 S. Ct. 586 (1996).

Here, Wallin requested transfers, but made no connection between these requests and his disabilities. Thus, MCF-Stillwater had no reason to think that the transfers were requested as accommodation for his disabilities. See Beck v. University of Wis. Bd. of Regents, 75 F.3d 1130, 1136 (7th

Cir. 1996) (when only one party knows what type of accommodation is required, that party is responsible for disclosing the relevant information). Additionally, it is unlikely that the accommodation Wallin now claims to have sought was reasonable. See Gaul v. Lucent Tech., Inc., 134 F.3d 576, 579, 581 (3d Cir. 1998) (employee's accommodation "request to be transferred away from individuals causing him prolonged and inordinate stress" was "amorphous" and unreasonable as a matter of law).

III.

Wallin next argues that his 1992 termination violated the Due Process Clause. As a threshold matter, we must determine whether Wallin waived constitutional claims stemming from events occurring prior to his signing the December 1992 Settlement Agreement. Wallin, supported by the EEOC as amicus, argues that because AFSCME was only authorized to negotiate Wallin's claims under the CBA, it was beyond AFSCME's authority to negotiate away Wallin's constitutional claims in the Settlement Agreement. We disagree.

The CBA, which only provided for arbitration of disputes over application of the CBA, did not authorize an arbitrator to resolve Wallin's statutory and constitutional claims. Cf. Patterson v. Tenet Healthcare, Inc., 113 F.3d 832, 837 (8th Cir. 1997) (statutory discrimination claims may be resolved in mandatory arbitration where the arbitration agreement "does not limit the arbitrator solely to interpretation of the [employment] contract"). Nonetheless, nothing would have prevented Wallin from waiving those claims, as long as his "consent to the settlement was voluntary and knowing." Alexander v. Gardner-Denver Co., 415 U.S. 36, 52 n. 15 (1974); see id. at 52 ("Although presumably an

employee may waive his cause of action under Title VII as a part of a voluntary settlement, mere resort to the arbitral forum to enforce contractual rights constitutes no such waiver." (footnote omitted) (emphasis added)).

Wallin understood and consented to a waiver of all pre-settlement claims. See Settlement Agreement at 1-2 (Wallin "understand[s] and voluntarily accept[s] the terms" of the settlement, which provides that the parties release each other from "claims based upon . . . violation of civil or constitutional right."), reprinted in J.A. at 25-26.[8] Moreover, Wallin's personal attorney reviewed the Settlement Agreement and signed off on its terms. See Lyght v. Ford Motor Co., 643 F.2d 435,440 (6th Cir. 1981) ("In determining that the settlement was voluntarily and knowingly made the court specifically noted that the plaintiff was represented by counsel at the time the last settlement was reached and accepted."). Thus, we hold as a matter of law that Wallin voluntarily waived all pre-settlement constitutional claims.

IV.

Wallin also raises due process claims in connection with his 1993 termination, which we address in turn.

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[8] The EEOC argues that because the Settlement Agreement does not "refer to any specific federal statute," it does not comprise a waiver of rights under § 1983. Br. of EEOC at 11. This argument is meritless. See Pilon v. University of Minn., 710 F.2d 466, 467-68 (8th Cir. 1983) (even though settlement does not specifically mention release of Title VII claim, "the wording of the release in the present case is clear and leaves no doubt that all claims potentially held by Pilon are waived" (emphasis added)). Wallin's Settlement Agreement similarly waived all pre-settlement constitutional claims.

Wallin first argues that he received an inadequate hearing, under Cleveland Board of Education v. Loudermill, 470 U.S. 532 (1985), prior to his termination in 1993. We disagree. When a state employee may be terminated only for cause, Loudermill requires that the employee receive a pretermination heating as "an initial check against mistaken decisions--essentially, a determination of whether there are reasonable grounds to believe that the charges against the employee are true and support the proposed action." Id. at 545-46. The April 30, 1993 meeting with Benson and Corbo provided Wallin all the process he was due. Namely, Wallin received "oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." Id. at 546. Thus, Wallin's claim must fail.[9]

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[9] We also reject Wallin's claim that he was deprived of liberty without due process when stigmatizing statements were made in his termination letter. Wallin's Loudermill hearing on April 30, 1993 was all the process he was due in connection with those stigmatizing statements. See Nelson v. City of McGehee, 876 F.2d 56, 58 (8th Cir. 1989). Wallin also claims that his liberty interest was deprived without due process when his termination letter was renamed a "suspension" letter and returned to his employment file upon his reinstatement. Because Wallin was not terminated in conjunction with this alleged defamation, but was reinstated, no liberty interest was deprived by the letter. Cf. Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 630 (2d Cir. 1996) ("a defamatory statement about an employee implicates a liberty interest when it is made during the course of that employee's termination from employment"), cert. denied, 117 S. Ct. 1083 (1997); Brayman v. United States, 96 F.3d 106 I, 1066 (8th Cir. 1996) (per curiam) ("[I]t is well established that defamation or injury to reputation by itself does not state a constitutional deprivation.").

B.

Wallin next argues that Benson and Corbo deprived him of property without due process when they suspended him for five days without pay prior to his pretermination hearing. This Court has held that a Loudermill hearing is required prior to the "suspension of a public employee who has a property interest in retaining the job." Bartlett v. Fisher, 972 F.2d 911,915 (8th Cir. 1992). We are unsure whether the state intended to create a property interest in avoiding an unpaid suspension when it agreed in the CBA that an employee could only be suspended without pay if "a reasonable basis exists to warrant such suspension." CBA at 48, reprinted in J.A. at 1190. However, we need not decide this issue because even if a property interest was created by the CBA's suspension provision, Wallin received all the process he was due prior to his suspension.

To determine what process is due, we balance three factors: first, "the private interest that will be affected by the official action;" second, "the Government's interest;" and third, "the risk of an erroneous deprivation of [the private] interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards." Matthews v. Eldridge, 424 U.S. 319,335 (1976). Wallin's private interest in interrupted income is minimal because the unpaid suspension was limited to five days, he retained his benefits, and a Loudermill hearing was provided shortly after his suspension. See Gilbert v. Homar, 117 S. Ct. 1807, 1813 (1997) ("Unlike the employee in Loudermill, who faced termination, respondent faced only a temporary suspension without pay. So long as the suspended employee receives a sufficiently prompt postsuspension hearing, the lost income is relatively insubstantial (compared with termination), and fringe benefits such as health and life insurance are often not

affected at all." (citations omitted)); Winegar v. Des Moines Indep. Community Sch. Dist., 20 F.3d 895, 899 n.5 (8th Cir. 1994) (while the length and severity of a suspension is not determinative of whether a property right exists, "they are factors to weigh in determining the appropriate form of hearing").

The state's interest in taking every precaution to preserve a safe prison environment, on the other hand, is substantial. This concern is heightened when the behavior alleged, if it continued, would endanger prisoners, prison employees, and the general public. Wallin's behavior created precisely those risks.

Finally, we "look more closely at the procedures [Wallin] actually received, to see if they adequately protected him against the risk of an erroneous deprivation of his interest in not being suspended from his job." Ibarra v. Martin, 143 F.3d 286, 290 (7th Cir. 1998). Here, Wallin was interviewed regarding each incident prior to his suspension. Thus, Wallin both had notice of the charges against him and had an initial opportunity to present his side of the story, making the likelihood of error minimal. See id. (presuspension procedures adequate when plaintiff was interviewed concerning incident); Chancy v. Suburban Bus Div. of Reg'l Transp. Auth., 52 F.3d 623,628 (7th Cir. 1995) (Chaney's "interest in avoiding a suspension is significant. Nonetheless, Chaney was on notice as to why he was being suspended and [the state employer's] interest in both managerial efficiency and in public safety clearly outweigh Chaney's interest in a pre-suspension hearing. The Constitution does not mandate additional protections at this stage."). Finally, Wallin received a Loudermill hearing soon after his suspension, exactly "the kind of prompt postsuspension hearing the Gilbert Court appeared to contemplate." Ibarra, 143 F.3d at 290. Because

the risk of error was small and the prison's need to take every precaution to preserve safety was substantial, we conclude that Wallin received his due process prior to the investigatory suspension.[10]

V.

For the foregoing reasons, we affirm.

A true copy.

Attest:
CLERK, U.S. COURT OF APPEALS,
EIGHTH CIRCUIT

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[10] Wallin's claim that the defendants conspired to violate his constitutional rights in violation of 28 U.S.C. § 1985 is meritless, and does not warrant further discussion. See 8th Cir. R. 47B.

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA THIRD DIVISION

CIV. FILE NO.3-95-367

Craig P. Wallin, Plaintiff,	)	
	)	**MEMORANDUM**
v.	)	**AND ORDER**
Minnesota Department of Corrections, et al., Defendants.	)	

[Filed October 17, 1997]

This matter is before the Court upon Defendants' Motion for an Award of Attorney's Fees. For the following reasons, Defendants' motion is granted in part and denied in part.

BACKGROUND

Plaintiff Craig Wallin ("Wallin") filed a complaint against Defendants after he was discharged from Defendants' coronal facility. The complaint alleged violations of due process, equal protection, the Employee Retirement Income Security Act ("ERISA"), and the Americans with Disabilities Act (;ADA"). Additionally, Wallin included several

supplemental state claims under. 28 U.S.C. § 1367. On August 8, 1997, this Court granted summary judgment for Defendants on all federal claims. The Court then declined to exercise supplemental jurisdiction over the remaining state claims, which were dismissed without prejudice.

Defendants now assert that they are entitled to a "limited" award of attorney's fees. Defendants' claim is based upon three grounds. First, Defendants assert that Wallin's state claims were frivolous because he had earlier negotiated a release with respect to these claims, which the Court ultimately enforced. Second, Defendants claim that Wallin's allegation that his Loudermill healing was insufficient was also frivolous. Finally, Defendants maintain that Wallin's stale law claims against the state were frivolous because Wallin was aware that the Eleventh Amendment barred such claims. Based on these allegations, Defendants request $1667.80 in attorney's fees.

DISCUSSION

Generally, our country's legal system operates under the assumption that each party will pay its own attorney's fees. See Aleyeska Pipeline Serv. Co. v. Wildemess Society, 421 U.S. 240 (1975). In the present case, Defendants contend that ma award of fees is appropriate based on 42 U.S.C. § 1988(b) and on Wallin's own acknowledgment in his complaint. Ultimately, the decision of whether to award attorney's fees is within the discretion of the district court. See Stanley v. Chilhowee R-IV Sch., Dist., 5 F.3d 319, 324 (8th Cir. 1993).

A. SECTION 1988(b)

Section 1988)b) provides, "in any action or proceeding

to enforce a provision of sections . . . 1983 [or] 1985 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, . . . a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988(b). However, the Supreme Court has stated that this provision is not intended to assess fees against plaintiffs simply because they do not prevail. See Hughes v. Rowe, 449 U.S. 5, 14-15 (1980) (citing Christiansburg Garment Co. v. EEOC, 434 U.S. 412, 422 (1978)). Instead, for a defendant to receive attorney's fees, "[t]he plaintiff's action must be meritless in the sense that is it groundless or without foundation." Id. at 14. The Hughes Court also noted that the mere granting of a motion to dismiss does not render a plaintiff's claim meritless as long as the claim required and "received the careful consideration" of the court. Id. at 15-16. Therefore, a prevailing defendant is entitled to an award of fees only if the court finds that the plaintiff's "claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." Id. at 15 (quoting Christiansburg, 434 U.S. at 422).

This Court finds that Defendants are not entitled to any attorney's fees pursuant to section 1988(b). Defendants have failed to show that Wallin's federal claims under sections 1983, 1985, ERISA, and the ADA were frivolous. See Marquart v. Lodge 837, 26 F.3d 842, 852 (8th Cir. 1994) (stating that the burden is on the defendant requesting fees to prove plaintiff's claim is meritless or frivolous). As Wallin points out, this Court granted summary judgment on those claims only after a careful consideration of their merits. (See Pl.'s Mem. Opp'n at 3.) In its Order, this Court extensively analyzed Wallin's hearing to determine whether it met due process requirements: (See Wallin v. Minnesota Dep't of Corrections, Civil File No. 3-95-367, at 7-12 (D. Minn. Aug. 8, 1997) (order granting summary judgment). Similarly, the Order included a thorough analysis of ERISA and the ADA

with respect to Eleventh Amendment immunity and the elements of each type of claim. (See id. at 13-21.) Because Wallin's claims require a thorough review before summary judgment was granted, the Court cannot characterize these claims as frivolous. Therefore, as Defendants have not established that Wallin's federal claims were meritless or frivolous, Defendants are not entitled to any fees or costs pursuant to section 1988(b).

B. Wallin's Acknowledgment

Defendants also contend that Wallin must pay costs and attorney's fees because of the acknowledgment included in his complaint. This acknowledgment stated that costs and attorney's fees could be awarded if any of Wallin's claims were frivolous, asserted in bad faith, solely to delay proceedings, or to harass, (Second Am. Compl. at 24.) As this Court has already determined that Wallin's federal claims were not frivolous or meritless, this acknowledgment will not allow for fees based on those claims. However, Defendants also contend that Wallin frivolously litigated claims for which he had already signed a release, and state law claims against the state which were barred by the Eleventh Amendment.

Defendants contend that Wallin was aware that his state law claims were barred, yet he still chose to pursue them, Defendants assert that Wallin's attorney was twice apprised of Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984), which established that the Eleventh Amendment prohibits suits against a state in federal court. (See Defs.' Mem. Supp. at 4.) However, Wallin's state claims were not disposed of on the merits. Instead, this Court simply declined to exercise supplemental jurisdiction over the claims once the federal claims were disposed of upon summary judgment. Defendants cannot prove Wallin's state claims were

frivolous because this Court never ruled upon the merits of those claims. See Marquart, 26 F.3d at 852. Moreover, this Court disagrees with Defendants' contention that Marquart, which discussed section 1993 claims, does not apply to this situation involving state law claims. Defendants contend that they are not basing their request for fees upon section 1988(b), but instead are relying on Wallin's acknowledgment in his complaint. However, both section 1988 and the acknowledgment would allow attorney's fees for frivolous claims. There is no reason why Marquart's limitation on when a defendant can prove a claim frivolous should not apply in the present situation. Accordingly, because Defendants cannot prove that Wallin's state claims were frivolous, it would be inappropriate for this Court to award attorney's fees to Defendants based upon these claims.

Lastly, Defendants assert that Wallin signed a Settlement Agreement releasing several claims, and his later litigation of these claims was frivolous. Wallin's Settlement Agreement was entered into on December 11, 1992, and declared its purpose as "to finally and forever resolve [Wallin's] grievance and all disputes regarding this matter." (Second Am. Compl. Ex. A.) This Court found no ambiguities in the Settlement Agreement; thus, it barred Wallin from asserting any claims based on acts on or before December 11, 1992. Furthermore, Wallin failed to cite any authority to support his contention that the Settlement Agreement, expressly entered into "to resolve the grievance of Mr. Craig Wallin," did not bind him. (Second Am. Compl. Ex. A.) To the contrary, Wallin voluntarily signed the agreement and testified that he had agreed to the Settlement Agreement. (Wallin Dep. at 318-20.) Consequently, this Court agrees with Defendants that Wallin was bound by this Agreement, and, therefore, the claims Wallin made which should have been barred by this Agreement were frivolous. Accordingly, Defendants are entitled to reimbursement for any

attorney's fees incurred in the defense of these frivolous claims.

Defendants provided an itemized list of attorney's fees in the affidavit of Kurt J. Erickson. For the most part, these fees are broken down by issue. Any item which is devoted solely to the issue of releases must be awarded in full to Defendants, (See Erickson Aff. ¶ 4.) The fee for those items which combine work on two or more issues must be divided among the number of issues involved. (See id.) After completing these calculations, this Court determines that Wallin must pay a total of $330.67 to Defendants for reimbursement of attorney's fees incurred by Defendants in the defense of Wallin's frivolous claims.

CONCLUSION

This Court finds that Wallin's claims based on federal civil rights laws were not frivolous and do not warrant an award of attorney's fees to Defendants. Additionally, because this Court declined to exercise jurisdiction over Wallin's state law claims, those claims cannot be found to be frivolous. However, Wallin's claims which were released by the Settlement Agreement he signed in 1992 are clearly frivolous. Therefore, Defendants are entitled to reimbursement for defense of those claims.

Accordingly, **IT IS HEREBY ORDERED THAT:**

1. Defendants' Motion for Award of Attorney's Fees (Clerk Doc. No. 167) is GRANTED IN PART and DENIED IN PART; and

2. Plaintiff shall pay Defendants $330.67 in attorney's fees.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: October 17, 1997

Paul A. Magnuson
United States District Court Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

Civ. File No. 3-95-367

Craig P. Walling, Plaintiff,	)
	) [Filed August 11, 1997]
v.	)
Minnesota Department of Corrections, et al., Defendants.	)

MEMORANDUM AND ORDER

This matter is before the Court upon Defendants' Motion for Dismissal and Summary Judgment. For the following reasons, the Court grants Defendants' motion.

I. BACKGROUND

Plaintiff Craig P. Wallin began working for Defendant Minnesota Department of Corrections ("Corrections") at the Stillwater facility ("STW") in 1980, progressing from a Corrections Officer I to a Corrections Officer III by 1985. The record shows no problems with Wallin's job performance until 1991, when he was diagnosed with symptoms of

depression.

In March 1992, Wallin was charged with gross misdemeanor assault against his live-in girlfriend. While the charge was pending, he entered a chemical dependency treatment program and returned to work on the condition that he remain chemical free for a period of three years. He eventually pleaded guilty to the assault charge and was sentenced to fifteen days in jail.

After the conviction for assault, Corrections sent Wallin a discharge letter. Then-Warden Robert A. Erickson cited as the cause of termination Wallin's criminal conviction and the negative message it sent to co-workers and inmates. Wallin's discharge became effective on August 27, 1992.

Wallin subsequently grieved his discharge through his union, AFSCME, pursuant to the collective bargaining agreement between AFSCME and the State of Minnesota. AFSCME reached a settlement with Corrections on behalf of Wallin, releasing all claims in return for Wallin's reinstatement at the same level of pay but with a demotion to Corrections Officer II. The settlement also provided for back pay and benefit accruals and contained a provision that Wallin's continued employment was contingent upon completion of his current treatment program.

Wallin returned to work on January 13, 1993. Problems between Wallin and his co-workers--in particular, Defendants Dennis Benson (Warden), David Corbo (Personnel Director), Elizabeth A. Hughes (Corrections Officer II), and Terry Bath (Corrections Officer II and III)--arose form the start. Wallin was accused of several transgressions, including calling co-workers derogatory names, mistreating and belittling inmates, breaching security, and threatening and intimidating Hughes. In turn, Wallin

claims to have been harassed and discriminated against because of his disability, citing in particular one incident in which he overheard Bath make a reference to "alcoholic fuckers."

The incident between Wallin and Hughes, which occurred on April 20, 1993, prompted Corrections to convene a disciplinary committee to review allegations against Wallin. During the committee's investigation, Wallin was placed on a five-day investigatory suspension without pay. The committee recommended to Warden Benson that Wallin be terminated. Benson agreed and sent a discharge letter to Wallin on April 30, 1993. Also on that day, Wallin was given an opportunity to respond to the allegations against him and to the discharge letter. After the hearing, Benson carried out Wallin's discharge, citing a pattern of misconduct and the need to protect both STW employees and the public.

Wallin grieved this second discharge once again through AFSCME, pursuant to the collective bargaining agreement. The grievance was eventually arbitrated. The arbitrator reinstated Wallin but denied him back pay from the time of his discharge in April 1993 until he returned to work in May 1994. Wallin also filed a Charge of Discrimination with the EEOC. He remains employed with Corrections at STW.

Wallin now brings this action, alleging twelve counts against Defendant Corrections and against Defendants Benson, Corbo, Hughes, and Bath in their individual and official capacities. Six counts invoke federal jurisdiction under 28 U.S.C. §§ 1343 and 1331: violation of due process--property interest, violation of due process--liberty interest, violation of equal protection, conspiracy, violation of the Employee Retirement Income Security Act ("ERISA"), and

violation of the Americans with Disabilities Act ("ADA"). The remaining six counts are supplemental state claims brought under 28 U.S.C. § 1367 for breach of contract, tortious interference with contract, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and violation of the Minnesota Human Rights Act ("MHRA"). Wallin asks the Court for compensatory and punitive damages, back pay, lost wages and benefits, and other equitable relief as the Court deems appropriate. Defendants move for summary judgment on the federal claims, alleging that Wallin has failed to raise a genuine issue of material fact on at least one element of each count. Defendants move for dismissal of the state claims on jurisdictional grounds or, in the alternative, for summary judgment for failure to raise a genuine issue of material fact on each claim.

II. STANDARD OF REVIEW

Summary judgment is appropriate if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. See Fed. R. Civ. P.56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Unigroup, Inc. v. O'Rourke Storage & Transfer Co., 980 F.2d 1217, 1219-20 (8th Cir. 1992). To determine whether genuine issues of material fact exist, a court conducts a two-part inquiry. The court determines materiality from the substantive law governing the claim. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). Disputes over facts which might affect the outcome of the lawsuit according to applicable substantive law are material. See id. A material fact dispute is "genuine" if the evidence is sufficient to allow a reasonable jury to return a verdict for the nonmoving party. See id. at 248-49.

Because discrimination is difficult to prove by direct evidence, courts should not grant summary judgment in employment discrimination cases "unless the evidence could not support any reasonable inference for the nonmovant." Wooten v. Farmland Foods, 58 F.3d 382, 385 (8th Cir. 1995) (quoting Crawford v. Runyon, 37 F.3d 1338, 1341 (8th Cir. 1994)); see also Johnson v. Minnesota Historical Soc'y, 931 F.2d 1239, 1244 (8th Cir. 1991). Summary judgment is appropriate only when a plaintiff fails to establish a factual dispute on each element of the prima facie case. See Bialas v. Greyhound Lines, Inc., 59 F.3d 759,762 (8th Cir. 1995).

III. DISCUSSION

A. Release of Claims

The Settlement and Release between the State of Minnesota, Department of Corrections, MCF-Stillwater and Minnesota State Employees Union, AFSCME, Council 6, AFL-CIO ("Settlement Agreement") is clear and unambiguous. Entered into on December 11, 1992 "to resolve the grievance of Mr. Craig Wallin," the Settlement Agreement declares its purpose to be "to finally and forever resolve this grievance and all disputes regarding this matter." (Second Amended Compl. Ex. A.) To this end, paragraphs seven and eight state:

> 7. The parties agree that this Settlement and Release is made for the purpose of releasing and discharging each other (including their employees, agents, officers and officials jointly and severally, individually and in their official capacities) by compromising and finally settling all claims, differences, grievances and causes of action against the above-noted parties based on any and all acts or

> omissions allegedly committed by them, including but not limited to, claims based upon contract, employment agreement, violation of statutory law, violation of civil or constitutional right, or tortuous [sic] conduct arising from or in any way connected with the parties' employment relationships, up to and including the date of this Settlement and Release.
>
> 8. This Settlement and Release waives or releases rights or remedies provided under Minnesota Statutes, Chapter 363, the Human Rights Act. This document constitutes written notice to the signatory party of the right to rescind this waiver or release within 15 calendar days of its execution by all parties. To be effective, the rescission must be placed in writing and be delivered to the departmental representative signing below either by hand or mail within the 15 calendar day period.

Id.

Defendants argue that the Settlement Agreement bars Wallin from asserting any claims arising from acts on or before December 11, 1992. Defendants contend that Wallin voluntarily accepted the terms of the agreement and is therefore bound by it. In support, Defendants adduce evidence that Wallin signed the agreement, stating, "I understand and voluntarily accept the terms of this Settlement and Release," and that Wallin testified in his deposition that he had indeed agreed to the Settlement Agreement. (Wallin Dep. at 318-20.) Moreover, Defendants note that Sid Helseth, the representative who signed the Settlement Agreement for AFSCME, testified that Wallin was a party to and had authority to revoke the agreement, and that Attorney Fiebiger wrote a letter to Helseth suggesting that Wallin was releasing

all claims under the agreement. (See Helseth Dep. at 12-13, 16, 18-20, 90-91, Exs. 1 and 2.)

Wallin counters that the Settlement Agreement was between AFSCME and Corrections only and that he was not a party to it. Therefore, he argues, he is not bound by it and has not released any of his claims prior to December 11, 1992. (See Pl.'s Mem. Opp'n Summ. J. at 8 n.4.)

Wallin, however, cites no authority to support his contention that the Settlement Agreement between Corrections and AFSCME, expressly entered into "to resolve the grievance of Mr. Craig Wallin," somehow does not bind him. (Second Amended Compl. Ex. A). More accurately, Wallin provides no support for his claim that the Settlement Agreement binds Corrections to confer on him the benefit of reinstatement at the same level of pay, binds Corrections even to the extent that any breach on its part may be actionable by Wallin himself (cf. Count VI--Breach of Contract), yet requires no legal detriment on his part as consideration.

Absent any countervailing authority, the Eighth Circuit decision in Pilon v. University of Minnesota, 710 F.2d 466 (8th Cir. 1983), controls. In that opinion, the Eighth Circuit held that where the language of a release "is clear and leaves no doubt that all claims . . . are waived," and where the release is a "negotiated contract agreement," the party on whose behalf the release was negotiated is bound by the agreement. Id. at 467-68. Furthermore, absent any showing of fraud or duress, a court need not "inquire into the voluntariness of the employee's consent." Id. at 468.

Because the Settlement Agreement was negotiated by Wallin's union on his behalf, because the language of the Settlement Agreement is unambiguous, and because Wallin

declined to exercise his right to rescind the Settlement Agreement within the stipulated fifteen-day period, Defendants are entitled to summary judgment on this issue. Therefore, the Court grants Defendants' motion for summary judgment and bars Wallin from asserting all claims against Corrections arising from acts occurring on or before December 11, 1992.

B. Counts I and II: Due Process--Property and Liberty Interests

Wallin brings his procedural due process claim pursuant to 42 U.S.C. § 1983, which prohibits a state actor from violating an individual's constitutional rights. The Fourteenth Amendment to the United States Constitution proscribes state action that deprives any person of life, liberty, or property without due process of law. See U.S. Const. amend. XIV, § 1. Wallin asserts that Defendants Benson and Corbo deprived him of a protected property interest without procedural due process when they discharged him from his employment with Corrections without sufficient pre- and post-termination procedures. Wallin further contends that Defendants Benson and Hughes deprived him of a protected liberty interest without procedural due process when they falsely disparaged and stigmatized him without those same procedures.

In order to prevail on his property interest due process claim, then, Wallin must establish that (1) he had a protected property interest in his employment with Corrections, and (2) Benson and Corbo deprived him of this right without due process of law. See Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538 (1985); Morrissey v. Brewer, 408 U.S.

471,481 (1972). For the liberty interest claim, Wallin must show that (1) Benson and Hughes, while acting under color of state law, falsely disparaged and stigmatized him, and (2) Benson and Hughes did so without providing him notice of the remarks and without affording him the opportunity to respond to them and clear his name. See Board of Regents v. Roth, 408 U.S. 564, 572-73 (1972).

Defendants concede that Wallin has a protected property interest in continued employment with Corrections. Moreover, they concede that, for summary judgment purposes only, Benson's discharge letter constitutes a "stigma" sufficient to raise a genuine issue of material fact on the first element of a liberty interest due process claim. Therefore, the Court's decision on these two counts hinges on the second element of a due process claim--namely, whether Wallin received the process that was due.

"The essential requirements of due process . . . are notice and an opportunity to respond." Loudermill, 470 U.S. at 546. This Loudermill hearing "applies equally to liberty interests and property interests." Schleck v. Ramsey County, 939 F.2d 638, 642 n.5 (8th Cir. 1991). The Eighth Circuit has interpreted Loudermill to imply that a pre-termination name-clearing hearing may be required in a liberty interest claim--as it is where a property interest is implicated--and that "the scope of such a hearing is dictated by Loudermill." Id. at 643 n.5.

Under Loudermil, a pre-termination hearing "need not be elaborate"; indeed, "'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." Loudermill at 545 (citing Matthews v. Eldridge, 424 U.S. 319, 343 (1976)). The hearing need not produce a particular result to achieve its purposes -namely, to

guard against mistakes in termination decisions, on one hand, and to "clear the air" of stigmas attached to name and reputation, on the other. See id. at 545-46. Rather, the hearing must only be held. "Post-termination administrative procedures" are also required under Loudermill. See id. at 547-48.

Wallin advances two arguments in support of his claim that he was denied due process regarding his property interest. First, he contends that the decision to terminate him was made prior to his Loudermill hearing, and therefore he was deprived of his property interest before the required pre-termination hearing. Second, he argues that the arbitration proceeding which eventually resulted in his reinstatement was insufficient under Loudermill's post-termination requirement, since it took place nearly one year after his termination.

Regarding his liberty interest claim, Wallin seems to think that establishing that Benson and Hughes stigmatized his name and reputation entitles him to survive summary judgment. This is not so. "Mere publication of a false stigmatizing reason for discharge, intentional or otherwise, is not actionable under § 1983 unless the injured party was denied the opportunity to refute the charge." Nelson v. City of McGehee, 876 F.2d 56, 58 (8th Cir. 1989) (citing Roth, 408 U.S. at 573). "It is the denial of due process, not the alleged defamation per se, which triggers a federal cause of action." Id. at 58 (citing Paul v. Davis, 424 U.S. 693,709-12 (1976)).

Defendants assert that Corbo is not a proper defendant in the property interest claim, because he did not actually terminate Wallin. They also raise some questions regarding Hughes's status in the liberty interest action. The Court need not decide these issues, as its analysis of the Loudermill

hearings is sufficient for the disposition of both actions.

The crux, then, of the due process issues in this case lies in determining whether Wallin received a Loudermill hearing prior to his discharge, and whether the administrative post-termination procedures were adequate.Loudermill makes clear that the pre-termination hearing must take place before the actual deprivation of a property interest. The "'root requirement' of the Due Process Clause [is] that an individual be given an opportunity for a hearing before he is deprived of any significant property interest." Loudermill, 470 U.S. at 542 (quoting Boddie v. Connecticut, 401 U.S. 371, 379 (1971)(emphasis in original)). The hearing must occur "prior to the discharge of an employee who has a constitutionally protected property interest in his employment." Id. (citing Roth, 408 U.S. at 569-70; Perry v. Sindermann, 408 U.S. 593,599 (1972)). Perhaps most clearly and unequivocally expressed, the hearing must take place "before the termination takes effect." Id. at 543 (citing Goss v. Lopez, 419 U.S. at 583-84; Gagnon v. Scarpelli, 411 U.S. 778, 784-86 (1973)). Thus, it is permissible to determine to discharge an employee before the Loudermill hearing; it is not permissible to have the discharge "take effect" beforehand. Wallin was given the opportunity to challenge the reasons for the dismissal decision before he was actually terminated. Because Wallin's discharge did not take effect until after his Loudermill hearing, he was given appropriate due process.

In its analysis of the post-termination hearing, the Loudermill Court deferred to the administrative procedures of the controlling Ohio statute. See id. at 546-48. The Court found that the mere assertion that the procedure took a long time "does not state a claim of constitutional deprivation." Id. at 547. In the instant case, the collective bargaining agreement between AFSCME and Corrections supplied the proper post-

termination administrative procedure. Wallin was granted arbitration. As long as the procedure was proper--and Wallin has made no claim that it was not, only that it took nearly a year--it is sufficient. Indeed, that Wallin was ordered reinstated by the arbitrator militates in favor of its adequacy.

At his Loudermill hearing, Wallin was also given the opportunity to respond to Benson and Hughes's allegedly false statements about him. Because the Loudermill hearing "applies equally to liberty interests and property interests," Schleck, 939 F.2d at 642 n.5, the Court concludes that Wallin was given due process as to both interests. Wallin fails to raise a genuine issue of material fact on the second element of a due process § 1983 claim--namely, that he was denied due process. Therefore, Defendants' Motion for Summary Judgment on Counts I and II is granted.

C. Count IV: Conspiracy

Wallin has presented no evidence of a conspiracy under 42 U.S.C. § 1985. He has merely alleged that two or more persons have deprived him of his constitutional rights, and that this allegation is in itself sufficient to raise a genuine issue of conspiracy. This is a false assumption.

In order to raise a genuine issue of conspiracy under § 1985, Wallin must "point to at least some facts which would suggest that [Defendants] 'reached an understanding' to violate [his] rights." Nelson, 876 F.2d at 59 (quoting Myers v. Morris, 810 F.2d 1437, 1454 (8th Cir. 1987)). Moreover, "allegations of a conspiracy must be pleaded with sufficient specificity and factual support to suggest a 'meeting of the minds' directed toward an unconstitutional action." Id. (quoting Myers, 810 F.2d at 1454; and Deck v. Leftridge, 771 F.2d 1168, 1170 (8th Cir. 1985)).

Because Wallin's allegations of conspiracy have neither been pleaded with sufficient specificity nor supported by facts suggesting Defendants reached an agreement to deprive him of his constitutional rights, Wallin has failed to raise a genuine issue of material fact regarding conspiracy. Therefore, Defendants' Motion for Summary Judgment on Count IV is granted.

D. Count V: ERISA

Wallin asserts in Count V that Corrections wrongfully violated his rights under ERISA by discharging him for the purpose of interfering with those rights. For the reasons outlined below, Wallin's claim must fail.

Defendants argue in the first instance that Wallin's claim is barred by the Eleventh Amendment to the United States Constitution. Wallin counters that it is not. The Eleventh Amendment provides: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. The Supreme Court has held that the Eleventh Amendment proscribes federal actions against states unless consent to suit is "unequivocally expressed." Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 99 (1984). In addition, "Congress has power with respect to the rights protected by the Fourteenth Amendment to abrogate the Eleventh Amendment immunity." Id. (citing Fitzpatrick v. Bitzer, 427 U.S. 445 (1976). In Seminole Tribe of Florida v. Florida, 116 S.Ct. 1114 (1996), the Supreme Court outlined the two-part inquiry to be used for determining whether immunity has been waived through congressional abrogation:

> In order to determine whether Congress has abrogated the States' sovereign immunity, we ask two questions: first, whether Congress has "unequivocally expresse[d] its intent to abrogate the immunity," and second, whether Congress has acted "pursuant to a valid exercise of power."

Id. at 1123 (quoting Green v. Mansour, 474 U.S. 64, 68 (1985)).

Regarding the first part of the inquiry, the Supreme Court in Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985), held that "Congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." Id. at 243. There is no such clear statement in ERISA. Wallin only asserts that ERISA contains a federal "jurisdictional mechanism" in 29 U.S.C. § 1132 (Pl's Mem. Opp'n Summ. J. at 60), but this section of the statute--indeed, the entire statute--is silent about the Eleventh Amendment.

This failure to pass the first part of the test should properly end the analysis. However, should a clear statement somehow be inferred from the language of the statute, Wallin's argument would fail the second element--namely, whether Congress acted "pursuant to a valid exercise of power." In Seminole Tribe, the Supreme Court held that the only recognized authority for congressional abrogation of the States' immunity is section five of the Fourteenth Amendment. See 116 S. Ct. at 1131-32. As Wallin points out, however, Congress need not have expressly articulated its intent to legislate under section five of the Fourteenth Amendment for its action to be constitutionally valid. In EEOC v. Wyoming, 460 U.S. 226 (1983), the Supreme Court

stated:

> It is in the nature of our review of congressional legislation defended on the basis of Congress's powers under § 5 of the Fourteenth Amendment that we be able to discern some legislative purpose or factual predicate that supports the exercise of that power. That does not mean, however, that Congress need anywhere recite the words "section 5" or "Fourteenth Amendment" or "equal protection" for "[t]he... constitutionality of action taken by Congress does not depend on recitals of the power which it undertakes to exercise.

Id. at 243 n. 18.

Nevertheless, the Court finds no discernible legislative purpose to support the contention that Congress enacted ERISA pursuant to section five of the Fourteenth Amendment. Indeed, the statute explicitly invokes Congress's commerce power as its enacting authority. See 29 U.S.C. §§ 100lb(a)(1) and (c), and 1001a(a)(1) and (c)(1). Unlike the ADA, which Wallin cites and which invokes both the commerce power and the Fourteenth Amendment, ERISA says nothing about the Fourteenth Amendment. The Court concludes, then, that because ERISA does not pass either element of the Seminole Tribe two-part analysis, ERISA does not abrogate the States' Eleventh Amendment immunity.

Finally, even if Eleventh Amendment immunity were abrogated, Wallin's claim would not survive summary judgment on the merits. "In order for an employee to establish

a prima facie case under section 510 of ERISA, he must demonstrate '(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled.'" Guarnaccia v. John Wanamaker, Inc., No. Civ. A. 88-6507, 1990 WL 90490, at *7 (E.D. Pa.) (quoting Hendricks v. Edgewater Steel Co., 898 F.2d 385, 389 (3rd Cir. 1990)). Wallin does little more than allege that he was discharged "for the purpose of" denying his rights under ERISA; he supplies no factual support for his allegation. "No ERISA cause of action lies where the loss of pension benefits was a mere consequence of, but not a motivating factor behind, a termination of employment." Nelson v. J.C. Penny Co. 858 F.Supp 914, 924 CN.D. Iowa 1994) (quoting Titsch v. Reliance Group, Inc., 548 F. Supp. 983,985 (S.D.N.Y. 1982). Therefore, Wallin must demonstrate "that Defendant terminated him with the specific intention of depriving him of his ERISA benefits." Id. at 924; see also Turner v. Schering-Plough Corp., 901 F.2d 335,348 (3rd Cir. 1990) (losing opportunity to accrue benefits due to employee's discharge "not alone probative of an intent to interfere with pension rights"). Wallin has alleged no such specific intent; the Court thus grants Defendants' Motion for Summary Judgment on Count V.

E. Count XI: ADA

Wallin asserts in Count XI a claim under the ADA. Defendants again argue that such a claim is barred by the Eleventh Amendment. Unlike ERISA, however, the ADA contains a clear statement of the statute's intent to abrogate the States' Eleventh Amendment immunity; in addition, the ADA was constitutionally enacted under section five of the Fourteenth Amendment. This Court has recently held, and now reaffirms, that ADA claims are not subject to Eleventh Amendment immunity. See Autio v. State of Minnesota., No.

3-96-383, 1997 WL 367013, at *7 (D. Minn. July 2, 1997); see also Mayer v. University of Minn., 940 F. Supp. 1474, 1477 (D. Minn. 1996).

The Court thus turns to the merits of Wallin's ADA claim. To obtain relief under the ADA, a plaintiff must establish (1) that he has a disability as defined in 42 U.S.C. § 12102(2); (2) that he is qualified to perform the essential functions of the job, with or without reasonable accommodation; and (3) that he has suffered an adverse employment action because of his disability. See Benson v. Northwest Airlines,Inc., 62 F.3d 1108, 1112 (8th Cir. 1995).

The ADA defines disability as (1) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (2) a record of such an impairment; or (3) being regarded as having such impairment. 42 U.S.C. § 12102(2). Wallin claims that his depression and alcoholism constitute disabilities under the ADA. Defendant Corrections contests that claim, but only with regard to Wallin's alleged depression. Corrections fails to address Wallin's evidence of alcoholism, a condition covered as a disability under the ADA. See Larson v. Koch Refining Co., 920 F. Supp. 1000, 1004 (D. Minn. 1996) (citing Khalifa v. Grays, Johnson & Assoc., 407 N.W.2d 733, 735 (Minn. Ct. App. 1987); Schmidt v. Safeway, Inc., 864 F. Supp. 991, 996 (D. Or. 1994)). The evidence shows, however, that Wallin sought help for both depression and alcoholism, and that Corrections knew about his treatment. Indeed, the Settlement Agreement reached between Corrections and AFSCME specifically noted in paragraph 6 that "[c]ontinued employment is contingent upon completion by the grievant [Wallin] of the current scheduled treatment program." (Second Amend. Compl. Ex. A.) Given such evidence and Corrections' knowledge of it, the Court assumes, without

deciding, that Wallin has raised a genuine issue of material fact with regard to the first element of his ADA claim.

As neither party raises an issue regarding the second element of an ADA claim, the Court now turns to the third element--namely, whether Wallin has suffered an adverse employment action because of his disability.

Wallin proposes two theories to meet his burden: first, that he was discharged because of his disability and, second, that he was harassed in the workplace because of his disability. The key phrase in both these theories is "because of." There is no cause of action within the plain meaning of the ADA for discharge or harassment that is not "because of" a plaintiff's disability.

This Court has held that while the ADA "protect[s] an individual's status as an alcoholic," an employer "need not tolerate misconduct. . . . [A]lcoholics are not protected from the consequences of their conduct." Larson, 920 F. Supp. at 1004 (quoting Flynn v. Raytheon, 868 F. Supp. 383,386-87 (D. Mass. 1994)). It is clear from an examination of the record that Wallin was discharged because of an ongoing pattern of misconduct. Affidavits have been filed attesting to Wallin's inappropriate conduct, which included calling co-workers derogatory names, making prurient comments to an inmate, mistreating and belittling an inmate, breaching security, and berating, threatening, and intimidating Hughes. Wallin has admitted to mistreating and belittling the inmate and to the breach of security. The incident with Hughes prompted Corrections to initiate an investigation of all allegations against Wallin, resulting in the decision to discharge him. All proper procedures, including a Loudermill heating, were followed. Regardless of whether Wallin's conduct stemmed from his disability, the record shows that he

was discharged "because of" that conduct, not because of the disability. This is permissible under the ADA.

The ADA, however, requires an employer to make reasonable accommodations to an otherwise qualified employee with a disability, unless the employer can show that the accommodation would cause undue hardship. See 42 U.S.C. § 12112(b)(5)(A). Nevertheless, "it is the responsibility of the individual with a disability to inform the employer that an accommodation is needed." Miller v. National Cas. Co., 61 F.3d 627, 630 (8th Cir. 1995) (quoting 29 C.F.R. App. § 1630.9). The only accommodation that Wallin alleges he requested was a transfer to another facility within the Department of Corrections.[11] Yet he fails to show how such a transfer would constitute an "accommodation" for his particular disability; instead, he cites Benson to show that a transfer can be a reasonable accommodation for some disabilities. See Benson, 62 F.3d at 1108. This is an important distinction, and because of it Benson is readily distinguishable on the facts.

In Benson, the employee was an airline mechanic who suffered complications from a rare neurological disorder which precluded repetitive use of his left arm and shoulder. Because such use was essential to the job of mechanic, the employee requested a transfer to another division--specifically, Engineering or Recycling--where he would not need to use his disabled limbs. Id. at 1114. In the instant case, had Wallin been transferred to another facility within the

---

[11] Wallin also alleges that his disability could have been accommodated by a leave of absence or time off, but since he never requested either from Corrections, Corrections was not required to consider it. See Miller, 61 F.3d at 630.

Department of Corrections, he would presumably still have had to perform the same functions as were required at STW. Wallin has not shown that it would have been otherwise. As such, it is hard to see how a transfer would constitute reasonable accommodation for his disability. Therefore, Corrections did not violate the ADA by denying the transfer.

Wallin's second theory, that he suffered workplace harassment because of his disability, takes the Court into a nebulous area of the law, an area not made any clearer by Wallin's failure to cite any cases in support of his arguments that Corrections' treatment of him constituted harassment, and therefore discrimination under the ADA. Some courts have appropriated the standard set forth in Harris v. Forklift Systems, Inc. 510 U.S. 17 (1993), a Title VII case, for use in ADA claims. See Mannell v. American Tobacco Co., 871 F. Supp. 854, 860 (D.C.E.D. Virginia 1994). Under that standard, "the plaintiff must prove that the harassment creates an objectively hostile or abusive work environment and that the putative victim subjectively perceives the environment to be abusive." Id. (citing Harris, 510 U.S. 17). Moreover, the plaintiff must show that the defendant not only "created an objectively hostile or abusive work environment," but that the defendant "did so in a discriminatory manner because of [the plaintiff's] disability. Id. "[Al mere offensive utterance" is insufficient. Id. (quoting Harris, 510 U.S. at 23).

None of Wallin's allegations of harassment can be properly construed to meet this standard. None raise a genuine issue that the harassing conduct was "because of" Wallin's disability. Indeed, Wallin merely lists a series of disconnected, albeit unpleasant, incidents. One such incident occurred outside the workplace in a restaurant. Another incident of"harassment" involved Corbo's request for a progress report on Wallin's treatment for depression and

alcoholism--a condition for continued employment agreed to by Wallin and stipulated in the Settlement Agreement. Other incidents--a co-worker's comment that he did not want to work with Wallin, Bath's pushing a laundry cart into Wallin--show puerile behavior, but not behavior prompted "because of" Wallin's disability. See McWilliams v. Fairfax County Bd. of Supervisors, 72 F.3d 1191, 1196 (4th Cir. 1996) (harassment of worker "'because of' [co-workers'] vulgarity and insensitivity and meanness of spirit," but not because of the plaintiff's sex and therefore not actionable in a Title VII gender discrimination claim).

The only incident from which discriminatory intent regarding disability could plausibly be inferred is Bath's aside about "alcoholic fuckers" that Wallin overheard. This deplorable comment, however, rises no further than the level of a "mere offensive utterance" and therefore falls short of the standard for actionable harassment under the ADA. Moreover, Bath apologized to Wallin for the comment, which is of course appropriate under the circumstances.

Because Wallin has failed to raise a genuine issue of material fact that he has suffered adverse employment action "because of" his disability, the Court grants Defendant's Motion for Summary Judgment on Count XI.

F. Count III: Equal Protection

Wallin alleges a violation of his Fourteenth Amendment right to equal protection under 42 U.S.C. § 1983. He relies on Hicks v. Saint Mary's Honor Center, 970 F.2d 487 (8th Cir. 1992), for the proposition that if he prevails on his ADA claim, then he is entitled to relief under § 1983. Wallin reasons by analogy to arrive at this proposition, because Hicks was a Title VII race discrimination

case.

The Court first notes that Hicks was reversed by the Supreme Court, though on other grounds. Saint Mary's Honor Center v. Hicks, 113 S. Ct. 2742 (1993). The Court also notes the difference between race discrimination, subject to strict scrutiny in an equal protection claim, and disability discrimination, subject to rational basis analysis. See City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). The Court further notes that the Eleventh Circuit has held that "a plaintiff may not maintain a section 1983 action in lieu of--or in addition to--a Rehabilitation Act or ADA cause of action if the only alleged deprivation is of the employee's rights created by the Rehabilitation Act and the ADA." Holbrook v. City of Alpharetta, Georgia, 112 F.3d 1522, 1531 (llth Cir. 1997). "To permit a plaintiff to sue both under the [Rehabilitation Act and the ADA] that set forth detailed administrative avenues of redress as well as section 1983 would be duplicative at best; in effect, such a holding would provide the plaintiff with two bites at precisely the same apple." Id.

This Court need not proceed, however, along any of these analytical lines, because Wallin has not prevailed on his ADA claim and, therefore, by his own reasoning under Hicks, is not entitled to relief under § 1983. Defendants' Motion for Summary Judgment is thus granted on Count III.

G. Counts VI-X, XII: State Claims

Counts VI-X and XII are state claims for breach of contract, tortious interference with contract, defamation, intentional infliction of emotional distress, negligent infliction of emotional distress, and aiding and abetting liability under the MHRA. Because this Court grants Defendants' Motion for

Summary Judgment on all of Wallin's federal claims, it is appropriate that the Court decline supplemental jurisdiction over all state claims. See 28 U.S.C. § 1367(c)(3). Therefore, Wallin's state claims are dismissed without prejudice.

IV. CONCLUSION

To survive summary judgment, Wallin must raise a genuine issue of material fact on each element of every claim. He has not done so on his federal claims. Defendants' Motion for Summary Judgment is therefore granted with respect to all federal claims, and Defendants' Motion for Dismissal is granted on all state claims.

Accordingly, IT IS HEREBY ORDERED that:

1. Defendants Minnesota Department of Corrections, Dennis Benson, David Corbo, Elizabeth A. Hughes, and Terry Bath's Motion for Dismissal and Summary Judgment is GRANTED with respect to Counts I and II (Due Process), Count III (Equal Protection), Count IV (Conspiracy), Count V (ERISA), and Count XI (ADA);

2. Counts I-V and XI of the Complaint are DISMISSED WITH PREJUDICE;

3. The Court declines to exercise jurisdiction over Plaintiffs' state causes of action. Therefore, Counts VI-X and XII of the Complaint are DISMISSED WITHOUT PREJUDICE.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: August 8, 1997

/s/_____
Paul A. Magnuson
United States District Court Judge

APPENDIX E

SETTLEMENT AND RELEASE
BETWEEN
STATE OF MINNESOTA,
DEPARTMENT OF CORRECTIONS,
MCF-STILLWATER
AND
MINNESOTA STATE EMPLOYEES UNION, AFSCME,
COUNCIL 6, AFL-CIO

This Settlement and Release is made and entered into this 11 day of December, 1992 by and between the State of Minnesota, Department of Corrections, MCF-Stillwater (hereinafter "Employer") and AFSCME, Council 6 (hereinafter "Union") to resolve the grievance of Mr. Craig Wallin, (hereinafter Grievant), Employer case no. 93-207, Union case no. 92M-16-600-6672.

WHEREAS, the Employer received a grievance from the Union regarding Mr. Craig Wallin; and

WHEREAS, the parties desire to finally and forever resolve this grievance and all disputes regarding this matter.

NOW THEREFORE, the parties hereto, acting through their respective agents, do hereby stipulate to this Settlement and Release in accordance with the following terms:

1. The grievant will be reinstated as a Corrections Officer 2 at MCF-Stillwater. He will be assigned to

the third watch.

2. The grievant's salary will remain at the level of the salary range for the Corrections Officer 3 at which he was paid. All salary increases will be governed by contractual provisions for salary conversion.

3. The grievant shall be made whole with regard to all back pay, benefits, and sick leave/vacation accruals.

4. The employer agrees to remove all documentary material related to the above-noted disciplinary action from the grievant's personnel file except notations necessary for administrative purposes. However, nothing in this Agreement shall preclude the employer from using such information in defense of any claims against the employer.

5. The employer will not impede in any manner the grievant's efforts for future transfers or promotions.

6. Continued employment is contingent upon completion by the grievant of the current scheduled treatment program.

7. The parties agree that this Settlement and Release is made for the purpose of releasing and discharging each other (including their employees, agents, officers and officials jointly and severally, individually and in their official capacities) by compromising and finally settling all claims, differences, grievances and causes of action against the above-noted parties based on any and all acts or omissions allegedly committed by them, including but not limited to, claims based upon contract, employment agreement, violation of

statutory law, violation of civil or constitutional right, or tortuous conduct arising from or in any way connected with the parties' employment relationships, up to and including the date of this Settlement and Release.

8. This Settlement and Release waives or releases rights or remedies provided under Minnesota Statutes, Chapter 363, the Human Rights Act. This document constitutes written notice to the signatory party of the right to rescind this waiver or release within 15 calendar days of its execution by all parties. To be effective, the rescission must be placed in writing and be delivered to the departmental representative signed below either by hand or mail within the 15 calendar day period. If sent by mail, the rescission must be postmarked within the 15 calendar day period, be sent by certified mail return receipt requested and addressed to:

Dave Corbo
Personnel Director
MCF-Stillwater
Box 55
Stillwater, MN 55379

If a party signing below elects to rescind or files a human rights charge during the 15 calendar day period, the other party may elect to treat the entire Settlement and Release as null and void.

9. The parties agree that this Settlement and Release (including any facts and documents related to this dispute) shall not be construed to set a precedent for any other employee's grievances.

10. This Settlement and Release is not an admission of liability of any kind by the Employer and no inference shall be made that the Employer has violated the agreement or participated in unlawful or improper conduct of any kind.

This Settlement and Release is the complete and total agreement between the parties.

FOR THE UNION

/s/_____
Sid Helseth
Business Representative

FOR THE EMPLOYER

/s/_____
Robert Erickson
CEO, MCF-Stillwater

/s/_____
Dave Corbo
Personnel Director,
MCF-Stillwater

/s/_____
Julie Angeles
Personnel Director
Department of Corrections

/s/_____
Randi Swendsen
Labor Relations Representative

I understand and voluntarily accept the terms of this Settlement and Release.

/s/_____ December 31, 1992
Mr. Craig Wallin Date
Grievant

Dated this 11 day of December, 1992

Supreme Court
FILED
FEB 4 1999
CLERK

No. 98-1007

In The

Supreme Court of the United States

October Term, 1998

CRAIG P. WALLIN,

Petitioner,

v.

MINNESOTA DEPARTMENT OF CORRECTIONS, ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENTS' JOINT BRIEF IN OPPOSITION

MIKE HATCH
Attorney General
State of Minnesota

KURT J. ERICKSON
Assistant Attorney General Of Counsel

STEVEN M. GUNN
Assistant Attorney General
Counsel of Record
445 Minnesota Street, Suite 1100
St. Paul, Minnesota 55101-2128
(651) 282-5700

Attorneys for Respondents Minnesota Department of Corrections, Benson, Corbo and Hughes

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

2899

QUESTIONS PRESENTED

1. Was it proper to enforce a settlement and release which Petitioner Craig P. Wallin ("Wallin") agreed to, signed, and could have rescinded regardless of his union's wishes?

2. Was Respondent Minnesota Department of Corrections ("DOC") properly granted summary judgment on Wallin's Americans With Disabilities Act claim, where Wallin failed to show that his discharge from employment was due to disability discrimination, and where he failed to show that he was subjected to a severely and pervasively hostile environment due to any disability?

3. Was Wallin deprived of any liberty interests in an allegedly stigmatizing letter, when it is undisputed that Wallin was given a *Loudermill* hearing on the discharge letter, which was followed by an arbitration on the reasons for the letter, resulting in a suspension being imposed through the letter instead of a discharge?

4. Was Wallin accorded sufficient due process of law when suspended without pay for five days pending investigation without a pre-suspension *Loudermill* hearing before the suspension, where the union contract governing his employment relationship specifically provided for such procedure, when the suspension was over a possible breach of security at a close security prison, and when Wallin was accorded ample post-suspension due process opportunities to contest the suspension?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents Minnesota Department of Corrections, Dennis Benson, David Corbo, and Elizabeth Hughes (f/k/a Elizabeth A. Binkley) respectfully request that this Court deny the Petition for a Writ of Certiorari (hereinafter "Petition" or "Pet.") seeking review of the decision of the United States Court of Appeals for the Eighth Circuit in this case.

OPINONS BELOW

The opinion of the Eighth Circuit is reported at 153 F.3d 681 (8th Cir. 1998) and is reprinted in the Appendix to the Petition (hereinafter "Pet. App at ___") at pages 2a-21a. The opinion of the District Court is reported at 975 F. Supp. 1234 (D. Minn. 1997) and is reprinted in the Pet. App. at 29a-52a. The opinion of the District Court finding Petitioner's litigation of the efficacy of the Settlement and Release he signed to be frivolous is not reported, but is reprinted at Pet. App. at 22a-28a.

STATEMENT OF THE CASE

This case arises out of Petitioner Craig P. Wallin's ("Wallin") employment with Respondent Minnesota Department of Corrections ("DOC") at DOC's Close Security Correctional Facility (prison) at Stillwater, Minnesota ("MCF-STW"). The case also involves Wallin's interaction with several DOC employees, to wit: Respondents Dennis Benson ("Benson"), the Warden at MCF-STW at the time

that most of the actions giving rise to this lawsuit arose; David Corbo ("Corbo"), the Director of Human Resources at MCF-STW at the time most of these actions arose; Elizabeth Hughes (formerly Elizabeth A. Binkley) ("Hughes"),[1] a Corrections Officer who worked with Wallin at certain times at MCF-STW;[2] and Terry Bath ("Bath"), another Corrections Officer working with Wallin at certain times at MCF-STW.[3]

I. Facts Regarding Wallin's Discharges From Employment.

Wallin began working at MCF-STW as a Corrections Officer in 1980. He progressed from a Corrections Officer I to a Corrections Officer III by 1985.

In March, 1992, Wallin assaulted his live-in girlfriend. Joint Appendix at pp. 2148-69, 74-75.[4] Wallin had been previously convicted of criminal misdemeanor assaulted against the girlfriend in 1991. A: 2156; Wallin Depo. at 10-12, A: 70.

Wallin was charged with gross misdemeanor assault for the March 192 assault. While this charge was pending,

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[1] In both the caption at the District court, the Eighth Circuit, and before this Court, Hughes is referred to by her former name of Elizabeth A. Binkley.

[2] DOC, Benson, Corbo, and Hughes are collectively referred to as "Respondents." This term does not include Respondent Terry Bath ("Bath"), who is separately represented.

[3] Bath is separately represented by Assistant Attorney General Margie Hendricksen.

[4] The citations to the Joint Appendix will be identified as follows: "A: ___."

Wallin entered a chemical dependency treatment program for alcohol abuse and then returned to work on the condition he remain chemical free for about three years. Wallin Depo. at 235-36, A: 126-27; and at A: 253-54.

As a result of the March 1992 assault, Wallin pleaded guilty to gross misdemeanor assault, and was sentenced to fifteen days in jail. A: 2167. MCF-STW, through then Warden Robert A. Erickson, issued a discharge letter to Wallin, stating, in part, that Wallin's criminal conviction sent the wrong message to his fellow employees and to inmates. A: 2176-79.

Wallin was given an opportunity to have a *Loudermill*[5] hearing before he was discharged. A: 2180. After providing Wallin with this opportunity, Warden Erickson decided to discharge Wallin.

Wallin was represented by the American Federation of State, County, and Municipal Employees, Council 6 ("AFSCME"), a union for, among others, State of Minnesota employees. Wallin grieved the 1992 discharge through AFSCME, and pursuant to the collective bargaining agreement. A: 2189-90; A: 2194.

Wallin's discharge grievance was settled. Wallin was reinstated to employment with MCF-STW, but was demoted from Corrections Officer III to Corrections Officer II. However, he continued to receive the same salary as a Corrections Officer III. *Id.* The settlement terms provide, in part, that:

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[5] *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985).

This Settlement and Release is made and entered into this 11th day of December, 1992, by and between the State of Minnesota, Department of Corrections, MCF-Stillwater (hereinafter "Employer") and AFSCME, Council 6 (hereinafter "Union") to resolve the grievance of Mr. Craig Wallin, (hereinafter Grievant), Employer Case No. 93-207, Union Case No. 92M-16-600-6672.

* * *

7. The parties agree that this Settlement and Release is made for the purpose of releasing and discharging each other (including their employees, agents, officers and officials jointly and severally, individually and in their official capacities) by compromising and finally settling all claims, differences, grievances and causes of action against the above-noted parties based on any and all acts or omissions allegedly committed by them, including but not limited to, claims based upon contract, employment agreement, violation of statutory law, violation of civil or constitutional right, or tortuous conduct arising from *or in any way connected with the parties' employment relationships, up to and including the date of this Settlement and Release.*

8. *This Settlement and Release waives or releases rights or remedies provided under Minnesota Statutes, Chapter 363, the Human Rights Act. This document constitutes written notice to the signatory party of the right to rescind this waiver or release within 15 calendar days of its execution by all parties.* To be effective, the rescission must be placed in writing and be

> delivered to the departmental representative signing below either by hand or may within the 15 calendar day period. * * *
>
> *If a party signing below elects to rescind or files a human rights charge during the 15 calendar day period, the other party may elect to restate the entire Settlement and Release as null and void.*

A: 25-26 (emphasis added.)

The document was singed by representatives of AFSCME and of DOC. Wallin also singed the Settlement and Release, stating "I understand and voluntarily accept the terms of this Settlement and Release." In his deposition, Wallin testified that the Settlement and Release was agreed to by him. Wallin Depo. at pp. 318-20, A: 147-48. Sid Helseth, the person signing the Settlement Agreement on behalf of AFSCME, has stated that the agreement was between AFSCME and DOC. Deposition of Sid Helseth at pp. 9-10 ("Helseth Depo."), A: 611. He has also stated under oath that Wallin was a party to the agreement, and had authority to revoke the agreement. *Id.* at 12-13, 16, A: 611-12; and Exh. 1, A: 632; and at 90-91, Supplemental Appendix of Appellees at pp. 6-7.[6] Wallin's attorney wrote a letter to Mr. Helseth supporting the position that Wallin was releasing claims under the Settlement Release. He commented on a draft of the Settlement and Release, telling Mr. Helseth, among other things, that:

> 7. *Finally, paragraph 6 of the Agreement regarding release of rights under the Minnesota Human*

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[6] Hereinafter, the Supplemental Appendix of Appellees will be referred to as: "Supp. App. ___."

> *Rights Act should include language clarifying that this only applies to acts or incidents arising prior to and up to the date of signing the Agreement. Mr. Wallin cannot release claims that may arise in the future.*
>
> *I think the Settlement Agreement and Release looks good with the exception of these changes and these really serve to safeguard Mr. Wallin's understanding of the terms.* These changes do no [sic] alter the basic terms of the Agreement.

A: 660-61 (emphasis added.)

As a result of the settlement, Wallin returned to work at MCF-STW on or about January 13, 1993. Wallin was later involved in several inappropriate actions.

On March 28, 1993, Wallin, in the presence of Corrections Officer Hans Meizinger, mistreated and belittled an inmate during a shakedown of the inmate's cell. Affidavit of Hans Meizinger, dated October 4, 1996 ("Meizinger Aff."), at Exh. A, A: 2340-42. Wallin provoked and harassed the inmate by having him step in and out of his cell several times, by yelling at him while standing next to him, and by prolonging the shakedown, which normally takes a short time, to over 25 minutes. *Id.* at Exh. B, p. 4, A: 2346. Even after the inmate became angry, Wallin continued to provoke him. When Wallin completed the shakedown, he was amused by his harassment, telling Meizinger "that's how a shakedown is done" and "he'll learn the rules, that will teach him." *Id.* at Exh. A, p. 3, A: 2342. Wallin was smiling when he made these comments. *Id.* Immediately after the harassing treatment, the inmate became extremely angry and frustrated, throwing

a chair against his cell door. Meizinger Aff. at Exh. B, p. 6, A: 2348. Wallin was interviewed about this incident and denied harassment, stating that he could not remember certain events, or that he was acting in the normal performance of his duties. Affidavit of James Crawford, dated October 3, 1996 ("Crawford Aff."), at Exh. B, pp. 1-11, A: 2265-75. During his deposition, Wallin admitted that he had belittled the inmate. Wallin Depo. at 269-70, A: 135.

On April 3, 1993, Wallin created a breach of security in Cell Hall D by deliberately placing cells on key lock. Dodge Aff. at p. 3, ¶ 11, A: 2218; Wallin Depo. at 252-54, A: 131. Wallin stated that this action was intended as a learning experience for a new officer in the work unit, yet Wallin never asked for or received permission from his superiors to conduct such an action. Wallin Depo. at 253, A: 131. Wallin admitted to causing the breach of security. Wallin Depo. at 252, A: 131.

On April 20, 1993, Wallin was involved in an incident with Respondent Hughes. During this incident, Wallin demonstrated inappropriate behavior by shouting at Hughes, using berating language, and approaching her in a threatening and intimidating manner. Hughes Aff. at pp. 1-2, ¶ 1, Supp. App. 8-9; and at Exhs. A and B, Supp. App. 11-28. When questioned about this incident, Wallin's answers were vague and evasive, including responses such as "I don't remember." Crawford Aff. at Exh. B, pp. 12-25, A: 2276-89.

The behavior described above precipitated investigations by DOC. Crawford Aff. at Exh. C, A: 2290-2337; Affidavit of Virginia LeVasserur, dated October 10, 1996

("LeVasseur Aff.") at pp. 1-2, ¶¶ 1-3, A: 2240-41; Second Affidavit of David Wilmes, dated October 4, 1996 ("2nd Wilmes Aff."), at Exh. B, A: 2370-2400. Investigator Crawford had initially been assigned to investigate the incident involving Wallin and the inmate. Investigator Wilmes investigated the incident involving Wallin and Hughes because it raised security concerns.

On or about April 22, 1993, Wallin was placed on investigatory suspension, 3rd Benson Aff. at p. 2, ¶ 5, A: 2414, and Exh. C, Supp. App. 30, without pay for five (5) days, because of concerns involving the incidents regarding Hughes and inmate Pickar. The AFSCME CBA specifically entitled Benson to place Wallin on investigatory suspension without pay, in order to protect the security of the prison, and thereby protect the public safety. 3rd Benson Aff. at Exh. A, p. 48; Supp. App. 32.

After the investigations, Benson tentatively decided to discharge Wallin. Second Affidavit of Dennis Benson, dated October 8, 1996 ("2nd Benson Aff. at ___"), at p. 2, ¶ 4, Supp. App. 35. The reasons stated in the discharge letter were based on the facts shown in the investigatory reports and statements. 2nd Benson Aff. at pp. 2-3, ¶ 8, Supp. App. 35-36. Wallin was given a *Loudermill* hearing, or opportunity to be heard at the time of his second discharge. *Id.* at ¶ 9, Supp. App. 36. Wallin did not ask for any reasonable accommodation of any disability at his *Loudermill* hearing. *Id.*; Wallin Depo. at p. 134, A: 101.

Finding a pattern of misconduct and no justification for the behavior during the *Loudermill* hearing, Benson proceeded with the discharge. Third Affidavit of Dennis Benson, dated May 2, 1997 ("3rd Benson Aff. at ___") at

pp. 1-2, ¶ 2, A: 2413-14. In discharging Wallin, Benson acted, among other reasons, to protect MCF-STW employees from further harassment, and to protect the public safety. 2nd Benson Aff. at p. 2, ¶ 7; Supp. App. 35.

Wallin grieved his second discharged through AFSCME, with the grievance eventually being arbitrated. The arbitrator did not affirm the discharge, noting that he did not find that Hughes had been harassed, but he did say that Wallin's period of unemployment from the time of his discharge, April 30, 1993, through the time of his reinstatement, May 1994, would be recorded as a disciplinary suspension without pay. S-J Corbo Aff. at Exh. I, p. 11, A: 2210. The disciplinary letter of April 30, 1993, was then amended to read that Wallin was being given a suspension instead of a discharge. *See* Pet. App. at 18a.

II. Facts Regarding Alleged Harassment Against Wallin.

On or about January 13 or 14 of 1993, when Wallin returned to work at MCF-STW, Bath, a Corrections Officer III (sergeant), was the lead worker for the area of MCF-STW in which Wallin was assigned. Bath told Corrections Officer Steve Summers to provide training to Wallin. According to Wallin, Summers said that he would provide training to Wallin, but did not want to do so. No reference to Wallin being disabled was made during the exchange. 3rd Wallin Depo. at 131, A: 193.

On or about January 31, 1993, Bath stated to Corrections Officer Ron Jansen, in Wallin's presence, that it was just like these "alcoholic fuckers" to go to treatment, jail and then be allowed back to MCF-STW. Wallin filed a

harassment complaint about this comment, which DOC investigated. Affidavit of Fredric Hillengass dated May 2, 1997 ("Hillengass Aff."), at p. 1, ¶ 2, A: 2418. The comment was substantiated in part. DOC therefore warned Bath about the remark. *Id.* Bath also apologized to Wallin for the remark. Hillengass Aff. at p. 2, ¶ 3, A: 2419.

On or about April 3, 1993, Wallin was working Cell Hall D at MCF-STW, and asked for an early out of work. Bath, the Watch Sergeant assigned to take down the names of persons requesting early outs, said there would be no early outs because there were not enough additional officers on duty to allow early outs. *Id.* at Exh. B, A: 2433-37. While Wallin disagreed with that assessment, he did not claim that Bath made any disparaging remarks to him in denying the early out. 3rd Wallin Depo. at 159, A: 200. Wallin suffered no injury from this event. *Id.* at 160, A: 200. On a day that he necessarily had to plan to work eight hours, Wallin was denied the opportunity to take two hours of vacation leave.

Nevertheless, DOC investigated the incident, and determined there was no basis for finding that Bath harassed Wallin or acted inappropriately towards him. Hillengass Aff. at Exh. B; A: 2433-2437.

Wallin also claims that Bath harassed him in 1994, outside the time period for which he obtained a right to sue letter from United States Equal Opportunity Commission ("EEOC"), by pushing a laundry cart into Wallin, and then, remarking to Wallin about moving his fat ass out of the way. Bath claimed that he did not see Wallin when he was pushing the cart and it struck Wallin. DOC, through LeVasseur, investigated the incident and found it

to be an accident, not an intentional act. No action was therefore taken against Bath.

REASONS FOR DENYING THE PETITION

The reasons for denying the Petition, while explained below with regard to each individual issue raised by Wallin, can be summed up in one statement: In granting summary judgment and enforcing the release, the District Court and the Eighth Circuit followed established case law and undisputed facts; hence there is nothing novel or otherwise precedent setting in this grant of summary judgment.

For example, first, the District Court enforced a settlement agreement release agreed to and signed by Wallin, DOC, and Wallin's union, AFSCME, releasing any liabilities incurred before December 11, 1992. The trial court also awarded DOC, Benson, Corbo, and Hughes their attorney's fees for having to enforce the release, where Wallin testified that *the release was agreed to by him and where Wallin's attorney, Stephen C. Fiebiger, provided advice to AFSCME on how to release Wallin's claims.* In this situation, Wallin can point to no Supreme Court cases conflicting with the present case. He can point to no circuit cases from other circuits conflicting with the present case. Given Wallin's individual control over the Settlement and Release, Wallin cannot point to the Eighth Circuit decision as being of such great importance that it must be heard by this Court. Finally, as the analysis below shows, he cannot point to the decision as being wrong.

Second, Wallin's principal claim is that, in violation of the Americans With Disabilities Act ("ADA"), DOC discriminated against him by discharging him because of his disabilities of depression and alcoholism and by knowingly allowing him to work in an environment hostile to the disabled. This claim, broken down into a "discharge theory" and "harassment theory," fails because the undisputed facts show that Wallin was not discharged "because of" any actual or perceived disabilities, and that he was not subjected to a severe and pervasively hostile work environment. On this claim, Wallin has not pointed to any Supreme Court or circuit court cases conflicting with the present case. He cannot show that a lack of evidence showing disability discrimination means that the summary judgment was wrong. With regard to harassment, the Eighth Circuit's decision adheres closely to recent Supreme Court rulings on harassment and hostile work environment. *See e.g., Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275, 2283 (1998), *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S. Ct. 998, 1003 (1998). Hence, not only is Wallin unable to show a conflict in authorities, the Eighth Circuit's decision, because it follows Supreme Court recent precedents, is not of such grave importance that it deserves Supreme Court review.

Third, Wallin's allegations that his "liberty interests" were violated in having his April 30, 1993, discharge letter changed to a suspension letter after arbitration is meritless. Wallin received a *Loudermill* hearing on the discharge letter when it was first issued on April 30, 1993. Further, when it was changed to a suspension letter in May 1994, it was not done in the context of a discharge,

but a suspension. The Eighth Circuit's decision on this point follows the traditional analysis of not allowing a liberty interest claim, where there has been a pre-deprivation hearing. Thus Wallin is unable to show a break from the precedent of this Court or other circuit courts. Further, given the fact that the alleged deprivation of a liberty interest took place over the suspension that followed the discharge, the issue raised by Wallin, and its precedential impact on other cases, is not of such grave importance as to justify Supreme Court review.

Finally, Wallin alleges that his due process rights under 42 U.S.C § 1983 were violated by being investigatorily suspended on April 22, 1993, without a pre-suspension *Loudermill* hearing. This argument fails because Wallin had no "property interest" in the five (5) day investigatory suspension; assuming *arguendo* that such a property interest exists, it was *de minimis;* Wallin's need for a pre-suspension *Loudermill* type hearing before being investigatorily suspended was far outweighed by DOC's and Benson's need to rapidly remove him from MCF-STW as a potential security threat in a close security prison; and, the need for an opportunity to be heard was ameliorated by the post-suspension due process Wallin had available to him (such as arbitration), which he in fact used.

In finding no deprivation of a property interest, the Eighth Circuit again followed this Court's recent rulings directly on the subject. *See Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997). Hence the Eighth Circuit's decision does not conflict with any precedents from this Court, or with other circuit court decisions decided after the Supreme Court's recent decision in *Homar*. The five (5)

day investigatory suspension does not, therefore, present any issues of such grave importance, so as to justify Supreme Court review.

I. CONSISTENT WITH ESTABLISHED LAW AND UNDISPUTED FACTS, THE DISTRICT COURT AND THE EIGHTH CIRCUIT ENFORCED A SETTLEMENT AND RELEASE THAT WAS PERSONALLY AGREED TO BY WALLIN.

The entire thrust of Wallin's argument is that his constitutional rights and statutory rights, such as his rights under the ADA, were negotiated away by his union, AFSCME, without his approval, thereby creating an issue as to whether a union, such as AFSCME, can release claims based on its authority to prosecute grievances.

The argument fails because the undisputed facts show Wallin and his attorney, Mr. Fiebiger, personally involved in negotiating a settlement that involves Wallin personally releasing statutory claims.

The fact that this was an agreement releasing Wallin's claims is made clear by his voluntary acceptance of the terms, by the language of the agreement, and by attorney Fiebiger's letter stating that the agreement was releasing rights of Wallin. For example, the language talks about waiving rights under the Minnesota Human Rights Act ("MHRA"). These are rights that were personal to Wallin, and not to AFSCME, as Wallin's attorney, Mr. Fiebiger, specifically alluded to in discussing the fifteen day rescission period. A: 660-61. Further, it is undisputed that Wallin – *without any need for approval from AFSCME* –

could have rescinded the entire agreement, including the release of constitutional, statutory, and tort claims. *See* Minn. Stat. § 363.031, subd. 2 (1998) (providing a fifteen (15) day period for rescission of agreements waiving MHRA claims).

Wallin's independent control over the Settlement and Release is of critical importance, because it makes clear that he was not forced by his union, AFSCME, to accept a settlement that was unacceptable to him. In *Alexander v. Gardner-Denver*, 415 U.S. 36, 58, including at n.19 (1974), this Court expressed its concern about the statutory rights of individual employees being subject to resolution in the employer/employee process of collective bargaining, and grievance including arbitration. This Court was concerned, *inter alia*, that unions representing employees over a statutory claim such as Title VII race discrimination, might not represent the employee with the vigor and zealousness to which the employee was entitled, and would have received if the claim was litigated in court by the employee personally. In other words, this Court was concerned that individual statutory rights would be given short shrift by collective bargaining units like AFSCME.

The present case presents a stark contrast to that situation. The undisputed evidence shows Wallin in *independent* control of whether to agree to the Settlement and Release. If he thought that his rights were being cavalierly or otherwise improperly bargained away by AFSCME, he had the authority to nullify the Settlement and Release. Hence the danger of Wallin's statutory rights being given short shrift by AFSCME was not present. Therefore, consistent with recent Congressional

enactments in the Civil Rights Act of 1991 and the ADA, *see* Pub. Law No. 102-166, § 118, 105 Stat. 1071, 1081 and 42 U.S.C. § 12212, about alternative dispute resolutions like settlement negotiations being encouraged as a method for resolving disputes over statutory rights, AFSCME, DOC, and Wallin were entitled to negotiate and reach an agreement to resolve all aspects of their employment dispute.[7] Nothing this Court has decided indicates that such a ruling, rooted firmly in Wallin's individual right to choose to settle under these terms, is of such grave importance that this Court should review this part of the decision.

II. NEITHER THE DISTRICT COURT GRANTING DOC SUMMARY JUDGMENT ON WALLIN'S ADA CLAIMS, NOR THE EIGHTH CIRCUIT IN REVIEWING THE GRANT OF SUMMARY JUDGMENT DEPARTED FROM WELL ESTABLISHED PRINCIPLES OF SUMMARY JUDGMENT JURISPRUDENCE.

To survive summary judgment on his ADA claim, Wallin had to establish genuine issues of material fact on the following points: 1) that he had a disability as defined

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[7] Further, in doing so, no new precedent was made on the issue of whether unions enforcing collective bargaining agreements may bargain away or otherwise represent individual employees over statutory claims, because, again, Wallin could exercise independent control to rescind the agreement, including the release. *See Wright v. Universal Marine Corp.*, ___ U.S. ___, 119 S. Ct. 391 (1998) (acknowledging but not deciding upon the tension between the resolution of statutory claims in management/labor processes such as arbitration and, alternatively, the resolution of such claims in the courts).

in 42 U.S.C. § 12102(2); 2) that he was qualified to perform the essential functions of the job, with or without reasonable accommodation; and 3) that he suffered adverse employment action *because of* his disability. *See Benson v. Northwest Airlines*, 62 F.3d 1108, 1112 (8th Cir. 1995) (emphasis added).

Wallin's ADA claim is essentially divided into two theories of liability.[8] First, according to Wallin, DOC violated the ADA by discharging Wallin from employment on April 30, 1993 ("discharge theory") due to a disability. Second, DOC allegedly violated the ADA by allowing Wallin to be harassed at work, such harassment constituting disability discrimination ("harassment theory").

With regard to discharge, Wallin admitted to belittling the inmate. Wallin Depo. at pp. 269-70, A: 135. Wallin admitted to engaging in a deliberate breach of security, Wallin Depo. at p. 252, A: 131; Exh. 28, A: 371, and admitted it was an intentional, wrongful act, Wallin Depo. at p. 254, A: 131. As the Eighth Circuit found, these facts show that Wallin was not discharged because of a particular disability; he was discharged for misconduct. *See* Pet. App. at 11a. In response, as the Eighth Circuit found, Wallin cannot point to any facts which show that he was discharged "because of" a disability. *See* Pet. App. at 10a (Eighth Circuit Opinion) (citing *Furnco v. Constr. Corp. v. Waters*, 438 U.S. 567, 576 (1978) (Title VII) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977)). Hence, the District Court and the Eighth Circuit did not

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[8] Wallin had argued retaliation under the ADA to the lower courts, but does not appear to do so here.

depart from established summary judgment jurisprudence in finding that there were no genuine issues of material fact on Wallin's ADA discharge theory; further, they properly determined that DOC was entitled to summary judgment as a matter of law.

Wallin's next theory of liability is that, analogizing to sex harassment constituting sex discrimination under Title VII, *see Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986), Wallin was subjected to a hostile work environment due to a disability, and hence was subjected to disability discrimination under the ADA. *See* Pet. at pp. 20-21.

The problem with this argument is that, consistent with *Faragher v. City of Boca Raton*, 524 U.S. ___, 118 S. Ct. 2275, 2283 (1998), the Eighth Circuit determined that, if a disability-harassment cause of action does exist,[9] it must be so sever, so hostile, so pervasive, that it creates an abusive work environment. *See* Pet. App. at 12a-13a. An environment that is not pervasively hostile, that has stray, boorish remarks, does not give rise to a hostile environment claim. *See Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. ___, 118 S. Ct. 998, 1003 (1998); *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21-22 (1993).

The Eighth Circuit followed these case precedents, evaluated each of the acts of alleged abuse, and found,

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[9] The Eighth Circuit initially observed that a hostile environment theory for violating the ADA had not been recognized. *See* Pet. App. at 12a. Nevertheless, in an abundance of caution, the Eighth Circuit then proceeded to analyze Wallin's hostile environment ADA claim under similar Title VII provisions. *See* Pet. App. at 12a-13a.

viewing them in the light most favorable to Wallin, that they did not show a severe and pervasively hostile work environment due to any disability. *See* Pet. App. at 13a. Hence, far from departing from established discrimination and summary judgment jurisprudence, the Eighth Circuit followed recent rulings of this Court, *see* Pet App. at 12a-13a, and correctly determined that DOC was entitled to summary judgment on Wallin's harassment theory under the ADA. The Eighth Circuit's decision on the ADA claim, then, does not break with established precedent nor present this Court with an issue of such grave importance that it should grant certiorari.

III. UNDER ESTABLISHED CASE LAW, WALLIN WAS NOT DEPRIVED OF ANY LIBERTY INTERESTS DUE TO ALLEGEDLY STIGMATIZING STATEMENTS BECAUSE HE RECEIVED A *LOUDERMILL* HEARING BEFORE THE DISCHARGE LETTER TOOK EFFECT, AND AN ARBITRATION AFTER IT TOOK EFFECT, WHICH RESULTED IN THE LETTER ONLY IMPOSING A SUSPENSION.

Wallin claims that he was deprived of a liberty interest in having his April 30, 1993, discharge letter changed to a suspension letter, after an arbitrator changed his discharge to a suspension. *See* Pet. at pp. 22-24. The argument fails for at least two reasons.

First, a section 1983 liberty interest is violated when, acting under color of state law, a person falsely disparages and stigmatizes another person, without the stigmatized person having notice of the disparaging or stigmatizing remarks and also not having an opportunity

to be heard with regard to such remarks. *See Board of Regents v. Roth*, 408 U.S. 564, 572-733 (1972). Mere publication of a false stigmatizing reason for discharge, intentional or otherwise, is not actionable under section 1983 unless the injured party was denied the opportunity to refute the charge. *See id.*, 408 U.S. at 573. It is the denial of due process, not the defamation *per se*, which triggers a federal cause of action. *See Paul v. Davis*, 424 U.S. 693, 709-12 (1976).

In the present case, Wallin was given a *Loudermill* hearing at the time of his April 30, 1993, discharge. His reasons for disputing the discharge were deemed insufficient. Wallin then grieved this discharge through the grievance process. He was given an opportunity to be heard, and did have his position presented at his arbitration hearing on March 9, 1994. For example, Wallin had the opportunity to challenge Benson's discharge letter and the March 1994, arbitration hearing on his discharge, and did, through his union, AFSCME. Hence there was due process regarding the allegation made in the April 30, 1993, letter.

Second, as the Eighth Circuit found, it is undisputed that when the April 30, 1993, discharge letter was changed into a suspension letter in May 1994, it was done in conjunction with a suspension, not a termination. Hence it did not implicate a liberty interest. *See* Pet. App. at 18a, fn. 9 (Eighth Circuit Opinion) (citing *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 630 (2d Cir. 1996) ("a defamatory statement about an employee implicates a liberty interest when it is made during the course of that employee's termination from employment"), *cert. denied*, 117 S. Ct. 1083 (1997)). *Donato*

cited, among other cases, *Paul*, 424 U.S. at 709-10, to buttress this conclusion.

It is therefore clear that the Eighth Circuit properly granted summary judgment on Wallin's section 1983 liberty interest claim, and, in so doing, did not depart from Supreme Court established principles of law in the area. Thus, Wallin's "liberty interest" claim does not create a basis for granting review.

IV. CONSISTENT WITH CASE LAW ON DUE PROCESS, WALLIN WAS NOT DEPRIVED OF DUE PROCESS WITH REGARD TO THE APRIL 22, 1993, INVESTIGATORY SUSPENSION.

Wallin's argument that this Court should grant certiorari regarding the five day investigatory suspension, *see* Pet. at pp. 16-19, is belied by the fact that this Court has recently dealt with this issue in *Gilbert v. Homar*, 520 U.S. 924, 117 S. Ct. 1807 (1997), by the fact that the suspension in the present case was only five days, or substantially shorter than the one dealt with in *Homar*, and by the fact that Benson's concern over security was a legitimate reason under current due process jurisprudence for not conducting a *Loudermill* hearing over the suspension.

The AFSCME CBA specifically provided that, on a reasonable basis, employees like Wallin cold be suspended *without* pay for up to five days. Supp. App. 32 (p. 48). No just cause standards applied to such suspensions. Hence, in the words of *Roth*, Wallin had no legitimate claim of entitlement to the contrary. He therefore

had no property interest requiring a *Loudermill* type hearing before imposing the suspension. Put another way, the suspension was analogous to the termination of an at-will employee, who similarly is not entitled to hearing before termination of employment. Hence, no due process right was violated.

Assuming *arguendo,* that the "reasonable basis" language created a protected property interest regarding the suspension, he was accorded all the process due, given the serious nature of the allegations against him. He was suspended after he belittled an inmate, caused a breach in security and allegedly harassed Hughes. Benson and DOC had a strong interest in removing Wallin from the dangerous business of prison security until an investigation of these claims was completed and reviewed. A: 2414, ¶ 5. To do otherwise might have subjected inmates, employees, and the public to further, unjustified security risks. Balancing these serious concerns against the short period of time for the investigatory suspension, and Wallin's post-suspension remedies, such as grievance and arbitration, which Wallin ended up using with regard to his subsequent termination on April 30, 1993, for these same issues, the Eighth Circuit, relying on *Homar,* 117 S. Ct. at 1813, was correct in granting summary judgment on the section 1983 due process claim.[10] *See* Pet. App. at 19a, 20a-21a. Hence Wallin's request for certiorari on this issue should also be denied.

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[10] The AFSCME CBA specifically provided for restoration of pay if no discipline followed the suspension, and grievance if discipline did follow. Supp. App. 32 (p. 48).

CONCLUSION

For all of the foregoing reasons, the Petition should be denied.

Dated: February 2, 1999

Respectfully submitted,

MIKE HATCH
Attorney General
State of Minnesota

STEVEN M. GUNN
Assistant Attorney General
Counsel of Record

KURT J. ERICKSON
Assistant Attorney General
Atty. Reg. No. 158380
Of Counsel

445 Minnesota Street,
Suite 1100
St. Paul, Minnesota
55101-2128
(651) 282-5700 (Voice)
(651) 296-1410 (TTY)

Attorneys for Respondents Minnesota Department of Corrections, Dennis Benson, David Corbo and Elizabeth Hughes (F/K/A Elizabeth A. Binkley)